Supreme Court, U. S.
FILED
JAN 10 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-952

INMOBILIARIA MELIA DE PUERTO RICO, INC.,

Petitioner,

—against—

PAINE, WEBBER, JACKSON & CURTIS, INCORPORATED,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on October 12, 1976.

Opinions Below

None of the opinions rendered in this case have yet been reported. The opinion of the United States Court of Appeals for the Second Circuit, No. 76-7087 (Oct. 12, 1976), is set forth in the appendix (A-1), together with the January 12, 1976 handwritten memorandum endorsement of the District Court for the Southern District of New York, directing entry of a default judgment (B-1) and the transcript of the January 21, 1976 oral argument, on motion for reconsideration before the District Court (C-1).

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered October 12, 1976. This petition for a writ of certiorari was filed within 90 days of that date. The Court's jurisdiction is invoked under 28 U.S.C. §1254(1) (1970).

Questions Presented

In an action to recover a mortgage brokerage fee, the District Court directed entry of a default judgment of approximately $340,000 in favor of plaintiff-respondent, Paine Webber Jackson & Curtis, Incorporated (herein "Paine Webber"), and dismissed the counterclaims of petitioner-defendant, Inmobiliaria Melia de Puerto Rico, Inc. (herein "Melia"), because of Melia's alleged non-compliance with certain discovery demands.

There were factors present indicating that the District Court's decision was arbitrary and capricious and made without knowledge of or inquiry into the status or facts of the case. Under its prior decisions, the Court of Appeals would have reversed for various reasons, including the District Court's failure to review the facts of the case prior to rejecting the report of the Magistrate supervising discovery. Subsequently, however, on June 30, 1976, this Court handed down its decision in *National Hockey League* v. *Metropolitan Hockey Club*, 96 S. Ct. 2778 (1976) [hereinafter cited as *National Hockey League*]. Apparently in reliance on that decision, the Court of Appeals affirmed.

The basic question presented is whether this Court's decision in *National Hockey League* mandated affirmance of the default judgment entered by the District Court?

Involved are two significant federal practice issues:

(a) Did the *National Hockey League* decision establish or confirm a requirement that a district court "consider the full record in determining whether to dismiss for failure to comply with discovery orders," and, if so, did the District Court in this case violate that requirement, inasmuch as the sudden and unexpected entry of the default was without notice or hearing, after being out of touch with what was transpiring in the case for the past seven months, and was done without exploring the merits, the necessity of the sought-for discovery or the possibility of lesser sanctions?*

(b) Where the Magistrate supervising discovery pursuant to a stipulation of the parties and more familiar than the District Judge with the facts of the case, submitted a recommended order containing an implicit finding that Melia was proceeding with discovery in good faith, did the District Judge's rejection of that "finding" violate the requirement of Rule 53(e), Fed. R. Civ. P., that "the court shall accept a master's findings of fact unless clearly erroneous?"

Statutory Provisions Involved

Rules 37(b) (d) and 53(e), Federal Rules of Civil Procedure. These Rules are reproduced in full in the Appendix (E-1). The Federal Magistrates Act, 28 U.S.C. 631 et seq.

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* In *National Hockey League*, a plaintiff in default was prevented from going forward with its claim. We treat as subsumed hereunder the question of whether an even more extensive, preliminary inquiry is required when an affirmative money judgment is being entered, in order to bar an undeserved windfall to a plaintiff whose claim may be without merit.

Statement of the Case

Preliminary Statement

Melia's appeal to the Circuit Court of Appeals for the Second Circuit had been from a default judgment entered by the District Court for the Southern District of New York (Motley, D.J.) pursuant to Rule 37, Fed. R. Civ. P. on January 22, 1976 (JA 238) (F-1),* which awarded Paine Webber the sum of approximately $340,000 (consisting of the $285,000 demanded in the complaint as a mortgage placement brokerage fee, together with interest from November 1, 1972, plus attorneys' fees in the sum of $3,743.50 and other costs) and dismissed Melia's $1,500,000 counterclaim.**

Paine Webber had requested this relief in a cross motion, originally returnable June 20, 1975 (herein the "Cross Motion"), which it made in response to a motion by Melia's New York attorneys for leave to withdraw from the case. The basis for Paine Weber's Cross Motion was Melia's alleged failure to comply with certain discovery demands. The District Court's initial decision granting Paine Webber's Cross Motion was set forth in a brief handwritten Memorandum Opinion (JA 173) (B-1) dated January 12, 1976. However, during the seven month period prior to this decision, the Magistrate supervising discovery conducted a hearing at which the parties had agreed upon a

* Petitioner has requested the transmission to this Court of the printed record (*i.e.*, a Joint Appendix and an Exhibit Volume submitted to the Circuit Court). JA references herein are to pages of the Joint Appendix; EV references are to pages of the Exhibit Volume; parallel citations to the Appendix have been included where available.

** The basis for the District Court's jurisdiction was diversity of citizenship.

discovery completion schedule. This schedule was then embodied in an order prepared by Paine Webber and adopted, with minor modifications, by the Magistrate. Melia thereafter set in motion all steps necessary to comply with this order, including flying its remaining deposition witness from Puerto Rico to New York.* It would have completed its discovery obligations but for the District Court's rejection of the Magistrate's order and entry of the default judgment without advance warning.

After handing down its unexpected default ruling, and while the Puerto Rican witness was still in New York, the District Judge had refused a telephonic request for an immediate rehearing, insisting, instead, on a formal written motion for reconsideration. The parties' first actual appearance before the District Judge in the case finally took place, pursuant to such motion, on January 21, 1976 (JA 212) (C-1).** The transcript of the oral argument on such motion indicates that the District Judge had issued the brief default handwritten opinion on January 12, 1976, primarily because of the age of the case, while laboring under a variety of misapprehensions and unaware that discovery was scheduled to go forward the very next day (see JA 213-216) (C-2-4).

Coincidentally, the Circuit Court appellate argument in *United States* v. *Stein*, No. 76-1299 (Oct. 22, 1976) [hereinafter cited as *Stein*], which immediately preceded argument of the instant appeal, involved the same District

* While Paine Webber apparently continued to argue that the incomplete discovery included further documents, as well as a deposition of Fullana, it was ultimately made clear that there were no such documents (see JA 222-24) (C-8-10).

** At such oral argument the District Judge appeared critical of Melia for not keeping its Puerto Rican witness available in New York from January 12th until the January 21, 1976 oral argument (see JA 225) (C-10).

Judge. (A copy of the decision in that appeal is set forth in the Appendix at D-1.) In its decision in the *Stein* case, the Circuit Court expressed sympathy for the "severe pressures" in this "heavily burdened court." Nevertheless, it reversed a sentencing decision of the District Judge and, in so doing, delivered what was, in effect, a stinging rebuke. After a careful review of the facts, the Circuit Court majority opinion concluded that the District Judge had only read the first four pages of a pre-sentencing report and had failed to turn over and read the last (fifth) page. The opinion rejected as untrue the District Judge's claim to have read the entire report. In a concurring opinion (D-17-18), Circuit Judge Lumbard agreed with the majority's analysis "that the district judge failed to consider the significant facts and opinions which were highly relevant to the sentence . . .", but was also of the opinion that reversal and remand to a new district judge was required because the sentence was "unprecedented and beyond all reason."

Although the instant appeal arises in a different procedural and substantive context than the *Stein* case, they both reflect a strikingly similar pattern of judicial behavior by the same District Judge. Here, as in *Stein*, there was an extreme, unprecedented and arbitrary disposition, following a failure to update stale, outmoded information. In the instant case, however, the Court of Appeals, in apparent deference to this Court's opinion in *National Hockey League*, failed to make an analogous factual inquiry into the state of the District Judge's knowledge, even though such an inquiry was mandated by its own, earlier decisions relating to entry of default judgments,* as well as by the requirement set forth in *National*

* See, *e.g.*, *Flaks* v. *Koegel*, 504 F. 2d 702 (2d Cir. 1974) (reversing and remanding for a hearing where a default was entered without factual exploration by the District Judge as to unexplained difficulties between a party and its attorneys); *Gill* v. *Stolow*, 240 F. 2d 669 (2d Cir. 1957) (reversing a dismissal entered for failure to go forward with discovery under circumstances in many respects closely analogous to the instant case).

Hockey League that the District Court "consider the full record."

The issue is whether the procedure employed by the District Judge is offensive to our concepts of due process. The *National Hockey League* decision, and others cited in it, suggest that the seven month gap in the District Court's knowledge of the case and its failure at any time to make a review of the entire record constitutes incurable error irrespective of whether one could, at this time, parse the entire history of the action and dredge up retroactive support for a default judgment.

A Review of the Factual Background Indicates Paine Webber's Claim to Be So Questionable and the Additional Discovery of Such Doubtful Utility That the Extreme Penalty Imposed Here Would Have Been Overly Harsh and Unwarranted Even Had There Been a Wilful Discovery Default.

The District Court at no time explored the merits of the action. Had it done so, the most superficial review of the facts would have disclosed that Paine Webber was not, in fact, the procuring cause of the mortgage loan Melia finally obtained and that the claim for a brokerage fee was therefore dubious and, indeed, was basically an immoral one. Moreover, without having at least a superficial knowledge of the merits, the District Judge was in no position to, and obviously did not, form a judgment as to the actual need for the additional discovery.

Such an exploration could have been readily accomplished, since the following basic facts were already established by documents and testimony adduced at pre-trial depositions:

The parties' initial discussions, which related to placement of a combined construction and mortgage loan for a proposed 627 unit condominium hotel ("Apartotel") in Puerto Rico, took place early in 1972. On March 13, 1972, Paine Webber's officer in charge, Leonard Wilkes ("Wilkes"), forwarded a proposed brokerage agreement designating Paine Webber as Melia's "sole and exclusive agent" to make application for a loan or loans in connection with "Melia's proposed Apartotel" (EV 303, 304-306). Although similar to the agreement sued on by Paine Webber in this action, this first version of its proposed broker's agreement conferred a 45-day brokerage exclusive on Paine Webber. Melia rejected this 45-day exclusive as too long and Paine Webber thereupon agreed to a 30-day period (JA 8).

As part of its inducement for this exclusive, Paine Webber represented to Melia that it had a close, "well-entrenched" relationship with First Mortgage Investors Trust ("FMI"), a large real estate trust. Jack Berger ("Berger"), Melia's then chief financial adviser, describing the conversation in his pre-trial deposition, said (EV 233-34):

> ". . . [A]t some point [Wilkes] indicated that Paine, Webber had even taken FMI public or acted as their investment bankers, so there was a very close relationship there. He went a long ways in certainly assuring me that the deal would be done with FMI."

Thereafter, in and prior to June, 1972, Paine Webber continually represented to Melia that it had obtained a firm

and definite loan commitment from FMI.* In this context, Paine Webber requested a $50,000 good faith deposit and extensions of its brokerage exclusive "for the time required to process [the loan] formally through the FMI Trustee Committee approval . . . ." However, after "repeated assurances [from Paine Webber to Melia] that [the loan] was at the last stage of . . . finalization" and that FMI's Trustees' approval was merely a formality (EV 280 and 234), Paine Webber and Melia learned, to their mutual surprise, that FMI was not going to make the loan after all.

Berger's description of his conversation with Wilkes when this became known was as follows (EV 285-86):

> ". . . well, first of all obviously he was as pained, I guess, as we were and as surprised as we were and said that he had been given assurances that the deal was concluded and was terribly sorry that this thing had fallen apart." **

Paine Webber thereafter faded from the scene, at least for the time being. Berger testified that Melia, having become "increasingly disillusioned," held no subsequent discussions with Wilkes regarding financing and they had both politely parted, at the end, with the vaguely expressed

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* See, for example, the handwritten note from Paine Webber to Melia's president (EV 512) stating:

> "Everything is go re Melia San Juan.
> "Please rush the following to me:
> (a) the signed FMI application.
> (b) the $50,000 refundable deposit . . . FMI
> (c) My letter of 6/26 . . . updating our authorization.
> Good luck to us all!!"

** An October 3, 1972 internal Paine Webber memorandum confirms Berger's testimony. There, in describing the FMI turndown to his superior, from Paine Webber's point of view, Wilkes says: "We were kicked in the head!!" (EV 528)

hope that "we could find some other community of interest in the future and that was the way it was left." Understandably, Melia made no further efforts to communicate with Paine Webber about other financing (EV 286-87). Having thus lost some seven months,* Melia ultimately obtained its loan from the Housing Investment Corporation ("HIC"), using a Puerto Rican broker, unrelated to Paine Webber, to whom it paid a full commission (see EV 93-97, 162-69).

However, Paine Webber's sense of failure was evidently transient. Early in its dealing with Melia, and before placing all its eggs in the FMI basket, Paine Webber had allegedly sent out a number of brochures describing the proposed loan to various other lenders. Upon learning, after the event, of the HIC loan, Wilkes claimed that HIC had been one of the recipients of such a mailing, and that Paine Webber was therefore entitled to its full brokerage commission on the loan.

Paine Webber continues by this lawsuit, to advance such a claim, despite Wilke's admission, in his deposition, that he had received no response from HIC after the mailing and that he had refrained from any further follow-up because "we were so far along with FMI . . . that we didn't pursue it." (EV 420-22). Furthermore, early in the case, Melia had made the following submission by way of affidavit (JA 48, 51):

> ". . . the president of HIC, one John D. Yates, is prepared to testify that he is aware of no approach by

* Melia's counterclaims are based on the sharp increase in construction and interest costs during this period (EV 78 and 287). Dismissal of these counterclaims, which are by no means frivolous, would seem to represent a very substantial penalty that could have been imposed in place of an affirmative default judgment, had the District Judge given any consideration to the possibility of lesser sanctions.

> plaintiff to HIC in the spring of 1972 or at any other time. While there is always the possibility that some contact was made by Plaintiff and HIC of which Mr. Yates is unaware, . . . Mr. Yates will testify that any such possible contact had no bearing on the decision by HIC to make the loan to the defendant."

Based on these facts, Paine Webber's claim to be a procuring cause of the HIC loan verges on being frivolous.* Had the District Judge become familiar with these underlying facts, they would have suggested the lack of need for further discovery and/or the inappropriateness of the extreme sanction imposed, as compared with possible lesser sanctions, such as dismissal of Melia's counterclaims.**

The Procedural History of the Action Establishes That the District Judge Did Not Consider the Entire Record Prior to Dismissal and Thus Failed to Learn of Facts That Would Have Negated a Finding of Wilfulness or Bad Faith.

The action's rather unusual procedural history suggests that a finding by the District Court of wilful non-compliance or bad faith on the part of Melia is unwarranted, particularly since any past default was so clearly in process of being cured. But assuming, *arguendo,* that an after the event, retrospective review by an appellate court of the

* Paine Webber has taken the position that it is entitled to its commission under its contract even if it were not the procuring cause of the loan. However, the law seems otherwise. See, *e.g., Character and Extent of Right of Broker Who has Exclusive Contract, Where Sale is Effected Without His Agency,* 64 A.L.R. 295 (1929) (*passim*, and see, especially, pp. 403, 415).

Paine Webber has also argued that changes in terms proposed early in their dealings by Melia were responsible for FMI's withdrawal. However, the timing, and admissions contained in Paine Webber's own memoranda (EV 512, 528), make it clear that this argument is unfounded.

** *Cf. Societe Internationale* v. *Rogers,* 357 U.S. 197, especially 208 (1958).

entire record could provide sufficient factual justification for such a finding based on failures much earlier in the case to go forward with discovery, this would still not justify or cure the improper method the District Court employed in making its findings and in overruling the Magistrate.

The basic procedural facts are undisputed. The District Judge originally left Paine Webber's motion for sanctions dangling for some seven months, while remitting the parties to further proceedings before the Magistrate.* (A prior motion by Melia had similarly been left undecided for a full year.) However, when the Magistrate, after a hearing, submitted his report, which contained an implicit finding as to Melia's good faith, the District Judge (who unlike the Magistrate, had never set eyes on the parties) granted the then seven month old sanction motion, without warning to the parties, without inquiry into the action's status or as to what the parties had been doing for the past seven months, and without being aware of the considerable efforts Melia was in process of making to comply with discovery demands. This effectively deprived Melia of the most rudimentary hearing, much less the full review of the entire record referred to in the *National Hockey League* decision.

The following, more detailed description of the action's procedural history supports this conclusion:

The summons and complaint were served on June 4, 1973 and Melia, represented by its then attorneys, Weiss, Rosenthal, Heller & Schwartzman (the "Weiss Firm"), served its original answer (JA 15) on July 30, 1973. At

* Arguably, Paine Webber should have proceeded, in the first instance, before the Magistrate, even without being referred there by the District Judge, in view of its prior Discovery Supervision Stipulation.

some point in the proceedings difficulties developed between the foreign-based defendant and its New York lawyers, which, on June 3, 1975, caused the Weiss Firm to move for leave to withdraw as counsel (JA 137).* Prior to that time, Paine Webber had made the first of various complaints about Melia's alleged failure to proceed with discovery by way of a motion to dismiss or for imposition of sanctions, returnable December 26, 1973 (JA 28). The Weiss Firm responded with a letter indicating that the delay was attributable to other commitments of counsel and concluding (JA 41):

> "It is unfortunate that the Court had to be troubled with this scheduling problem. We certainly have not caused any substantial delay in the progress of this matter. The depositions in question can probably be completed in two days, if indeed they take that long."

By memorandum endorsement (JA 43) the District Judge referred the motion ". . . to a Magistrate for hearing and report on whether the Court should impose sanctions and/or compel discovery in accordance with plaintiff's application." The case was then assigned to Magistrate Sol Schreiber. However, the parties thereafter voluntarily chose to extend the scope of this referral by a stipulation (hereinafter the "Discovery Supervision Stipulation") (JA 44) signed by both sets of attorneys, which not only set forth a specific discovery schedule, but also stated:

* Paine Webber has made much of these difficulties between Melia and the Weiss Firm, implying that they were created by Melia for purposes of delay and are indicative that Melia's defenses and counterclaims are without merit. However, these insinuations have no basis in the record while the rather unusual procedural history of the case provides a more plausible explanation.

"All future pre-trial discovery proceedings shall be referred to Magistrate Sol Schreiber for supervision."

As originally drafted, the Magistrate's Discovery Supervision Stipulation scheduled the depositions of Martin L. Cohen ("Cohen"), Melia's president, and Jack H. Berger ("Berger"), its Chief Financial Adviser, for February 28 and March 5, 1974, respectively; the deposition of another Melia officer, residing in Puerto Rico, Pedro Fullana was "Deferred *sine die*." The District Judge, however, without a hearing of any kind, subsequently amended the stipulation by inserting a date of April 17, 1974 for Fullana's deposition. This was done prior to the taking of the other depositions, which (as indicated by the stipulation) the parties themselves had assumed might obviate the need for Fullana's deposition. Thus, the amendment appears to have merely been a calendar control device; it certainly could not, under the circumstances, have implied any judgment by the District Court as to the actual necessity for the Fullana deposition.

Thereafter, the depositions of Cohen and Berger (EV 1 and 202) went forward in accordance with the schedule set forth in the Discovery Supervision Stipulation. Both depositions were, to all intents and purposes, concluded in a day each (see EV 114 and 299), as the Weiss Firm had originally suggested would be the case. Analysis of the real issues of the case makes it apparent that these two depositions exhaustively covered all areas of inquiry pertinent to Paine Webber's claim, as well as some that went well beyond reasonable theories of relevance. It is true that the Weiss Firm never challenged Paine Webber's right to further discovery. However, even a cursory reading of the deposition transcripts suggests that any such additional discovery would be repetitious, burdensome and unnecessary. For the basic facts were not in dispute and

Paine Webber's claim was inevitably going to stand or fall on such issues as whether it was the procuring cause of the loan and whether Melia interfered with the transaction, rather than on testimony Fullana might give.

In affidavits submitted by its attorneys, Paine Webber had described negotiations in which the Weiss Firm participated, pursuant to which the action had come close to being settled (see JA 66). Ultimately, however, the proposed settlement was rejected by Melia's foreign-based principals. It was only then that the Weiss Firm, apparently for the first time, explored the facts in sufficient detail to ascertain that its client had valid counterclaims (JA 54; EV 58-59). Leave of Court was thereafter sought and obtained (JA 130) to assert such counterclaims in an amended answer (JA 132).

The delay by the Weiss Firm in exploring the counterclaims and its focus, instead, on a settlement which its client opposed, suggests one explanation of the friction that developed. In addition, further difficulties between the Weiss Firm and its client apparently arose because of the pressure and burdens on the District Court referred to in the *Stein* case, which manifested themselves in the following context: After the depositions of Cohen and Berger were concluded, Paine Webber persisted in additional discovery demands, including seeking to take in New York the deposition of Fullana, a Puerto Rican resident. In response, Melia, by motion returnable April 22, 1974 (JA 46), requested, *inter alia*, that the action be transferred to the District Court of Puerto Rico or, alternatively, that Fullana's deposition be held in Puerto Rico. The District Judge failed to rule upon this motion for almost a full year (JA 127). In the meantime, and while Melia was hoping that the case would be transferred, Paine Webber was enabled by the Discovery Supervision Stipulation to continue

to press forward with various other of its discovery demands (see JA 125).*

As a result of this procedure, document production by Melia was eventually completed. Innuendoes to the contrary by Paine Webber are without basis as indicated by the following facts contained in the record:

The deposition of Melia's then president, Cohen, was taken on February 28, 1974. At its outset, Cohen stated that there was little in the way of correspondence because "we did practically everything in person;" later, in connection with a request that there be a further search for additional documents, he commented "I don't know if there is anything different that you are going to receive. I just mailed you whatever they had" (EV 7-8 and 13). Paine Webber's attorneys nevertheless continued to attempt to impose their own, Americanized view of proper record keeping on Melia. Thus, they kept insisting, via various applications, that there ought to be more documents (see, *e.g.*, JA 149). However, it ultimately turned out that virtually all Melia's pertinent documents had, in fact, been produced as part of Melia's initial production, just as

* It is easy to picture a foreign-based defendant's confusion and suspicion over the seemingly inconsistent, multiple tracks on which the litigation was progressing at this point. At the rehearing argument the Weiss Firm had declined specific comment on the nature of the difficulties that had arisen between it and its client. However, its representative did comment, there, in discussing this specific subject (JA 229) (C-13-14):

> "Your Honor, I think there is one other factor we have to throw in that hopper to make it complete. In 1974 I made a motion, early in '74, March or April, for the following relief: to transfer this case to the district court in Puerto Rico, for permission to amend the answer and interpose a counterclaim, and for the Court to direct that Mr. Fullana's deposition be taken in Puerto Rico.
>
> One year later, approximately, this Court decided that motion, denied the application to transfer it to Puerto Rico—"

Cohen had stated. (A few more documents were produced subsequently.) The Weiss Firm, after having confirmed by letter, "that we have no further documents to produce" (JA 170), expressly proffered affidavits to that effect to the District Court in the course of the oral reconsideration argument (JA 222-24) (C-8-10).*

Thus, it is now clear that the default judgment could only have rested on Melia's failure to produce non-existent documents and on its earlier failure to produce Fullana for a deposition even though Fullana, without knowing of the default, had flown from Puerto Rico to New York in order to be deposed (see JA 223, 199) (C-9). While this might seem unfair under any circumstances, it seems particularly so in view of the further proceedings held before the Magistrate to whom the parties had stipulated to submit discovery questions.

These proceedings followed the June, 1975 motion by the Weiss Firm for leave to withdraw as counsel (JA 137) and the responsive Cross Motion for sanctions (JA 142), both of which motions were then referred by the District Judge to the Magistrate (JA 141A). The Magistrate scheduled a hearing on December 1, 1975 (JA 197), after which he recommended that both motions be disposed of on the following terms and conditions (JA 190-193, 197-98, 216-17, 220-23) (C-4-5, 7-9):

> (1) Pedro Fullana was to be deposed in New York on January 22, 1976;
>
> (2) Melia, by January 15, 1976, would either produce additional documents sought by Paine Webber

* The Weiss Firm, at such argument, stated, in response to the Court's question as to whether all records requested by plaintiff had now been produced (JA 222) (C-8):

> "As far as I know, Your Honor . . . they have been produced and my clients are prepared to give affidavits to that effect."

or affidavits indicating that the requests had been fully complied with; and

(3) The Weiss Firm would be permitted to withdraw only if substitution of new counsel were effected in such manner as not to occasion further delay.

These recommendations of the Magistrate were agreed to by both sides and an order for the Magistrate's signature was prepared by Paine Webber's lawyer (JA 204, 220-221) (C-7-8). The Magistrate made minor handwritten changes in the order, then signed it and forwarded it to the District Judge for what all parties must have assumed was a *pro forma* approval (JA 190-93, see also JA 198-199, 216, 233-234) (C-4, 16).

Pursuant to the Magistrate's proposed order, Melia made arrangements for Fullana's deposition, moving it forward in time, however, with Paine Webber's consent, to January 14, 1976 from the January 22, 1976 date originally appearing in the order (JA 199). As part of these arrangements, Fullana arrived in New York on January 13, 1976, to prepare for the January 14th deposition (JA 199). However, between the time Fullana arranged his departure from Puerto Rico and his arrival in New York, the District Judge, by its brief January 12, 1976 memorandum endorsement (JA 173) (B-1), without warning, notice or hearing, and to everyone's surprise, rejected the Magistrate's proposed order and directed entry of a default. After learning of the District Judge's decision, Paine Webber's attorneys declined to proceed with Fullana's scheduled deposition (JA 215) (C-3). The default decision also deflected Melia's attorneys from producing the affidavits of full compliance with document production which they would otherwise have filed and which they subsequently proffered (JA 223-24) (C-9-10).

Melia's attorneys did attempt, by a telephone call to the District Judge's chambers, to obtain immediate reconsideration of the default ruling as soon as they learned of it and while Fullana was still present and available for his deposition. The District Judge, however, directed that any such questions be raised by way of formal motion papers (JA 226) (C-11). Melia thereafter filed its motion for reconsideration of the ruling (JA 194), but was not granted oral argument as to such motion until January 21, 1976.

At the outset of the January 21, 1976 oral argument, the District Judge proved to be unfamiliar with the actual sequence of events, at first expressing a belief that Melia improperly failed to appear for a deposition scheduled on January 12, 1976 and "that after the parties were notified of the Court's January 12th order, the defendant decided to appear the next day, the 13th or the 14th, for the taking of the deposition. . ." (JA 213-14) (C-2).* In addition, the District Judge apparently was under the impression that affidavits from Melia indicating compliance with document discovery demands were overdue as of the time the default was entered (see JA 223) (C-9).**

Although these misapprehensions were clarified at the January 21, 1976 argument, the District Judge denied defendant's motion for reconsideration and adhered to the original ruling, giving two different reasons for this decision. Near the outset of the argument, the District Judge

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* In actuality, as noted above, the date original scheduled for Melia's deposition in the Magistrate's order was January 22nd (JA 214) (C-3), and this was moved to January 14, 1976 at Melia's suggestion.

** In fact, however, as noted above, these affidavits were not due until January 15th under the Magistrate's order (JA 223-24) (C-9), and, as the Weiss Firm indicated, they would have been forthcoming by this date but for the default ruling on January 12th.

stated that *"the reason* for [rejecting the Magistrate's report] is that this case is on the trial calendar . . . ." (JA 217) (C-5). (Emphasis added.) Later during the argument the District Judge stated (JA 231) (C-15):

> ". . . the record is clear that your client wilfully failed to appear for his deposition, and *that is why* a default judgment is going to be entered against him, notwithstanding the recommendations of the Magistrate, because I disagree with it, that he is entitled to a second chance." (Emphasis added.)*

Melia's brief to the Circuit Court cited prior decisions of that Court which, at the very least, on the facts present here, would have required a remand for an evidentiary type hearing as to the issue of wilfulness.** However, in its opinion affirming the default, the Circuit Court appeared to place considerable reliance on this Court's intervening *National Hockey League* decision, evidently regarding it as having overruled such decisions. In so doing, the Circuit Court ignored the teaching of the *National Hockey League* decision that a District Court should consider the full record *before* determining whether to dismiss.

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* At the conclusion of the argument, the District Judge similarly commented (JA 235) (C-17):

> As I told you, it is my ruling that I am not bound by the Magistrate's reports in these matters. The Magistrate is not a district judge. And I have gone over this, and the record is extensive and clear that your client wilfully disobeyed the orders of the Court.
>
> So you can go to the Court of Appeals and we will find out whether your client can wilfully disobey a court order."

** *Flaks* v. *Koegel*, 504 F. 2d 702 (2d Cir. 1974); see also, *Gill* v. *Stolow*, 240 F. 2d 69 (2d Cir. 1957).

Reasons for Granting the Writ

Several important procedural questions are posed by this petition, relating to the powers and obligations of district judges in connection with their entry of default judgments and their review of magistrate's findings.

Summary

The Court's recent decision in *National Hockey League* v. *Metropolitan Hockey Club, Inc. supra,* confirmed in district judges a broad discretionary power to dismiss a civil action for failure to comply with discovery orders. A significant issue posed by this petition is the extent to which the language of the *National Hockey League* decision should be clarified by spelling out the concomitant obligations of a district court judge when entering such a default, in order to guard against misuse or abuse of that power.

The basic question is the extent to which courts of appeals can and must review and regulate the *procedure* followed by a district judge in connection with the entry of a default. While conceding to the district court the power to dismiss even in a case where it would not have done so, does the court of appeals nevertheless have an obligation to satisfy itself that the district court, before dismissing, did consider the entire record, in compliance with the *National Hockey League* requirement? In the instant case, the District Judge, who, after remitting the parties to further proceedings before a Magistrate, was seven months out of touch with subsequent developments when the default decision was rendered, cannot be said to have complied with this requirement.

A second significant issue raised by this petition involves the question of whether the provision in Rule 53(e), Fed. R. Civ. P., that the findings in a special master's report shall not be set aside by a district judge unless "clearly erroneous," is applicable when the parties voluntarily stipulate to refer all discovery questions to a magistrate. If so, on the facts of the instant case, the District Judge's rejection of the Magistrate's report was necessarily without sufficient basis.

I

The Requirement Set Forth in the National Hockey League Decision for a Review of the Entire Record Was Ignored in This Case.

There are sharp distinctions between the facts of the present case and those in *National Hockey League.* In *National Hockey League,* the District Court had written a "comprehensive memorandum . . . supporting its order of dismissal" which demonstrated that appropriate consideration had been given "to the full record in determining whether to dismiss for failure to comply with discovery orders. . . ." Pursuant to such detailed consideration of the *entire* record, the District Court there had found that the plaintiff's repeated unfulfilled promises and commitments in regard to discovery following innumerable extensions, demonstrated "flagrant bad faith" and that the discovery was "crucial."

Here, in contrast, the District Court, just as it had done in the *Stein* case, figuratively failed to turn the fifth page. There was once again a substantial gap in the District Court's knowledge of the case, by virtue of its having

ruled unexpectedly on a seven month old motion, without hearing or warning to the parties, while they were actively proceeding before a magistrate and elsewhere with the very discovery that constituted the basis for entry of the default.*

It can be argued that this case required an even more careful review preliminary to entry of judgment than that required in the *National Hockey League* case. For here, the sanction was entry of a default judgment in a large sum against the supposedly offending party, rather than merely barring recovery of a plaintiff, who refused to comply with discovery orders, as in the *National Hockey League case.* Obviously, a district judge entering a default for or against a plaintiff should not be expected to conduct a full scale trial. Nevertheless, a factual inquiry, at least sufficient to establish that an undeserving plaintiff is not getting a totally unwarranted windfall, and/or that the incomplete discovery was important, would seem to be called for where an affirmative judgment for a large sum is to be entered upon a default unrelated to the merits.**

However, the distinction seems unnecessary to Melia's basic argument that the District Judge here did not make any review, much less the careful review of the entire record that was made in *National Hockey League.*

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* The oral argument, on Melia's motion for reconsideration, can hardly be said to have retroactively filled this seven month gap. In *Gill* v. *Stolow, supra,* it was expressly recognized that such a "review" on motion for reconsideration is necessarily a "prejudicial" situation.

** Indeed, this would have been the normal practice in New York State courts, upon entry of a similar default (see, *e.g.*, 4 Weinstein-Korn-Miller, N.Y. Civ. Prac., ¶3215.25, at n. 109 [1975]).

It seems inconceivable, had a review of the entire record been made, that the District Judge would have concluded that Melia was wilfully continuing in default. For despite initial delays, there was, ultimately, good faith compliance or attempted compliance. Indeed, Melia was actually in process of final and full compliance with all outstanding discovery requirements at the very moment the default was being entered. Such a review would also, in all likelihood, have demonstrated that the remaining deposition would be largely duplicative of other discovery and hardly "crucial," as was the discovery in the *National Hockey League* case. It might also have resulted in consideration of a lesser sanction, such as merely dismissing Melia's counterclaims, even if the District Judge had remained convinced that there were a wilful default.

If allowed to stand, this decision establishes a dangerous precedent. For no comparable default judgment decision has been found where the rendering court appears to have been so far out of touch with both the merits and the procedural posture of the case.

II

The Findings of the Magistrate to Whom the Parties Had Stipulated to Submit All Discovery Issues Came Within the Purview of Rule 53, Fed. R. Civ. P., and Were Not Subject to Reversal Unless "Clearly Erroneous."

The Magistrate's submission to the District Judge necessarily embodied a finding that Melia was proceeding in good faith and that any prior discovery delay did not merit entry of a default judgment. The District Court implicitly acknowledged this in its statement (JA 235) (C-17):

> "As I told you, it is my ruling that I am not bound by the Magistrate's report in these matters. The Magistrate is not a district judge."*

However, a recent decision by the Circuit Court of Appeals for the First Circuit** suggests that the District Court's view was incorrect and that, to the contrary, on the facts of this case, Rule 53(e)(2), Fed. R. Civ. P. shielded the Magistrate's factual findings from reversal unless they were "clearly erroneous."

It is, of course, true, that reference of the earliest discovery motion to the Magistrate by the District Court was made under the provisions of the Federal Magistrates Act (28 U.S.C. §631, et seq.) and not under Rule 53, Fed. R. Civ. P. However, the parties, by stipulation, thereafter voluntarily extended the scope of this referral. In the *DeCosta* case, it was held, in connection with an analogous voluntary reference to a magistrate, that the "clearly erroneous" standard of review set forth in Rule 53(e)(2), Fed. R. Civ. P., was applicable to the magistrate's factual findings.

Assuming, as suggested by the *DeCosta* case, that the Magistrate's findings as to Melia's good faith come within the purview of Rule 53(e), Fed. R. Civ. P., it is self-evident that the District Judge, seven months removed from the progress of the action, could not possibly have been in a position to rule that such findings were "clearly erroneous."

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* Elsewhere, the District Judge had similarly stated that the default was being entered notwithstanding the recommendation of the Magistrate, because "I disagree with it. . . ." (JA-231) (C-14-15).

** *DeCosta* v. *Columbia Broadcasting System, Inc.*, 520 F. 2d 499 (1st Cir. 1975), *cert. denied*, 423 U.S. 1073 (1976) [hereinafter cited as *DeCosta*].

CONCLUSION

Several considerations which normally would impel the granting of certiorari seem present here. The Circuit Court's decision in this case has affirmed and sanctioned a drastic departure by the District Court from the accepted and usual course of judicial proceedings. In addition, such affirmance appears in conflict with procedural requirements spelled out by this Court in *National Hockey League* v. *Metropolitan Hockey Club, Inc., supra,* as well as with other earlier decisions of this Court relating to entry of default judgments. Furthermore, the aspect of the case relating to the scope of review of a Magistrate's findings appears to present an important question of federal law not yet settled by this Court. For all of these reasons, the writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

Appendix A

Opinion of Affirmance of Circuit Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 13—September Term, 1976.

(Argued September 15, 1976 Decided October 12, 1976.)

Docket No. 76-7087

PAINE, WEBBER, JACKSON & CURTIS, INCORPORATED,

Plaintiff-Appellee,

—against—

INMOBILIARIA MELIA DE PUERTO RICO., INC.,

Defendant-Appellant.

Before:

LUMBARD, MANSFIELD and MULLIGAN,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York, Hon. Constance Baker Motley, *Judge,* granting plaintiff a default judgment against defendant for failure to comply with pre-trial discovery orders.

Affirmed.

BOB D. MANNIS, New York, New York (Dewey, Ballantine, Bushby, Palmer & Wood, New York, New York, Judson A. Parsons, Jr., of Counsel), *for Plaintiff-Appellee.*

NORMAN SOLOVAY, New York, New York (Holtzmann, Wise & Shepard, New York, New York, David S. Lindau, of Counsel), *for Defendant-Appellant.*

MULLIGAN, *Circuit Judge:*

On January 22, 1976, the United States District Court for the Southern District of New York, Hon. Constance Baker Motley, *Judge,* entered judgment pursuant to Fed. R. Civ. P. 37(b)(2) striking the amended answer of defendant Inmobiliaria Melia de Puerto Rico, Inc. (IMPR), dismissing defendant's counterclaims with prejudice, and granting plaintiff Paine, Webber, Jackson & Curtis, Incorporated (Paine Webber) a default judgment against IMPR. The underlying cause of action was a suit by Paine Webber to recover a brokerage commission for services rendered in obtaining financing for the construction of IMPR's condominium hotel (Apartotel) in Puerto Rico. The financing was ultimately obtained from the Housing Investment Corporation, a subsidiary of the Chase Manhattan Bank, through the services of an independent broker, Juan J. Otero, allegedly while defendant's exclusive agency contract with Paine Webber was in full force and effect. The judgment awarded Paine Webber was in the amount of $285,000 with interest from November 1, 1972, plus expenses, including attorney's fees, of $3,743.50. On appeal, IMPR argues that the penalty of a default judgment was unwarranted on the facts of this case. We affirm the judgment below in all respects.

This action was commenced by the filing of a complaint on May 31, 1973, and IMPR answered on July 30, 1973. On September 25, 1973, Paine Webber noticed the depositions of Martin Cohen and Pedro Fullana, officers of IMPR,

and Jack Berger, a financial officer of a principal stockholder of IMPR who initiated the transaction with Paine Webber, for November 1, 1973 in New York, and also served notice that certain documents be produced by October 25, 1973.* None of the requested materials were forthcoming on that date.

On October 29, 1973, the parties agreed to reschedule the Cohen and Berger depositions for December 4, 1973, and to proceed with the production of documents "as soon as possible, hopefully prior to November 16." On December 3, 1973, defendant's counsel stated that he was still unable to comply with the production request, and that neither Cohen nor Berger would appear the following day for their scheduled depositions. The result was Paine Webber's first motion for sanctions pursuant to Fed. R. Civ. P. 37, served on December 18, 1973, seeking an order directing that either IMPR's answer be stricken and that judgment by default be entered, or that defendant be compelled to proceed with discovery.

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* Paine Webber's Rule 34, Fed. R. Civ. P., Notice to Produce requested, *inter alia:*

2. All documents which reflect or refer or relate to any negotiation, discussion, agreement, understanding or communication occurring from January 1, 1971 to date with Paine, Webber or any broker other than Paine, Webber in connection with any financing or proposed financing of the construction of the Apartotel.

3. All documents which reflect or refer or relate to any negotiation, discussion, agreement, understanding or communication occurring from January 1, 1971 to date concerning any loan made, or proposed to be made, by Housing Investment Corp., Inc. or The Chase Manhattan Bank, N.A. to you in connection with the construction of the Apartotel or the actual or proposed employment of any broker in connection with such loan.

4. Any other documents which reflect or refer or relate to any negotiation, discussion, agreement, understanding or communication occurring from January 1, 1971 to date between you and any other person concerning the financing of the construction of the Apartotel.

The motion was assigned to Magistrate Sol Schreiber for a hearing and report and the parties, at his suggestion, entered into a stipulation on February 22, 1974, which included a discovery schedule. As modified by Judge Motley, this provided for compliance with Paine Webber's Rule 34 request on or before February 26, 1974; for the taking of the Cohen and Berger depositions on February 28, 1974 and March 5, 1974 respectively; and for the taking of the Fullana deposition on April 17, 1974. This order was dated February 26, 1974 and was filed on March 5, 1974.

The Cohen and Berger depositions were held as ordered, but by February 26 the document production was still incomplete. Paine Webber called this dereliction to IMPR's attention in a letter dated April 8, 1974, and reminded defendant of the upcoming Fullana deposition. IMPR's response was to serve motion papers on April 12, 1974 seeking to transfer both the site of the Fullana deposition and the venue of the action to Puerto Rico. Fullana did not appear on April 17.

By letter dated June 26, 1974, Paine Webber again sought completion of document production. On October 21, 1974, defendant's counsel wrote that neither they nor Berger had any more documents to produce. The result of this further delay was a November 6, 1974 conference with Magistrate Schreiber followed by a discovery order filed on November 11. IMPR was directed to comply with Paine Webber's request by December 15, 1974, failing which it was recommended that defendant's answer be stricken and judgment be entered for plaintiff. The extent of defendant's compliance was to provide, on December 16, only certain of Cohen's travel and telephone records, as well as some correspondence. On December 18, Magistrate Schreiber directed defendant's counsel to submit affidavits by IMPR's principals indicating full compliance with Paine Webber's request. These have never been furnished.

On March 31, 1975, the district court filed an order denying defendant's motion to transfer the Fullana deposition to Puerto Rico. It was thereafter scheduled for April 23, 1975, but on April 22 Paine Webber was informed that Fullana would not appear. On June 3, IMPR's counsel sought leave to withdraw, stating that they had been "unable to obtain the necessary cooperation from the client that is required for us to do a professional and competent job of representing the defendant in this case." Paine Webber opposed this motion on the ground that it would be subjected to further delay, and cross-moved for a default judgment. The matter was again referred to Magistrate Schreiber for a hearing and report on September 3, 1975. In a letter dated October 3, Judge Motley ordered that all pre-trial procedures be completed by December 1, 1975, with a trial date scheduled sometime after April 1, 1976.

Seeking to afford defendant yet another opportunity to comply, Magistrate Schreiber forwarded a proposed order to Judge Motley dated December 9, 1975, containing a revised discovery and deposition schedule. On January 12, 1976, Judge Motley rejected the proposed order and granted Paine Webber's cross-motion for entry of a default judgment. IMPR then moved to vacate the January 12 order and for entry of Magistrate Schreiber's recommendation. A hearing was held on January 21, 1976, at which defendant's motion was denied.

Where sanctions are imposed under Rule 37, Fed. R. Civ. P., the question is not whether this court, as an original matter, would have applied them, but whether the district court abused its discretion in so doing. *Flaks* v. *Koegel*, 504 F.2d 702, 707 (2d Cir. 1974); *Trans World*

Appendix A

Airlines, Inc. v. *Hughes,* 332 F.2d 602, 614 (2d Cir. 1964), rev'd on other grounds, 409 U.S. 363 (1973). The Supreme Court has recently observed in *National Hockey League* v. *Metropolitan Hockey Club, Inc.,* 96 S. Ct. 2778 (1976), reversing a Third Circuit judgment which had reversed the dismissal of an action for failure to timely answer written interrogatories, that there is a tendency for reviewing courts to be heavily influenced by the severity of the sanctions under Rule 37. "But here as in other areas of the law, the most severe in the spectrum of sanctions provided by statute or rule must be available to the District Court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent." *Id.* at 2780-81. The record here, as indicated in the statement of facts, fully supports the finding that Fullana had willfully failed to appear for his deposition for more than seven months. Moreover, the corporate records sought here appear to be pertinent to the litigation and would normally be expected to be readily obtainable. The failure ever to produce them or by affidavit to account for their nonproduction again compels the conclusion that the District Judge did not abuse her discretion in applying the sanctions described. Judgment affirmed.

Appendix B

January 12, 1976 Initial Default Memorandum Endorsement of the District Court

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Appendix C

Transcript of January 21, 1976
Oral Argument on Motion for Reconsideration

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

73 Civ. 2422

(CBM)

PAINE, WEBBER, JACKSON & CURTIS, INCORPORATED,

Plaintiff,

vs.

INMOBILIARIA MELIA DE PUERTO RICO, INC.,

Defendant.

Before:

HON. CONSTANCE BAKER MOTLEY,

District Judge.

New York, N. Y.
January 21, 1976—4.20 P.M.

APPEARANCES:

DEWEY, BALLANTINE, BUSBY, PALMER & WOOD, ESQS.,
Attorneys for Plaintiff

By: JUDSON A. PARSONS, JR., ESQ. and
BOB DAVIS MANNIS, ESQ.,
of Counsel

WEISS, ROSENTHAL, HELLER & SCHWARTZMAN, ESQS.,
Attorneys for Defendant

By: RICHARD F. HOROWITZ, ESQ.,
of Counsel

The Court: Are you Mr. Horowitz?

Mr. Horowitz: Yes, your Honor.

The Court: Mr. Horowitz, I have your letter of January 15th asking for a reconsideration of an order which I entered in this matter on January 12, 1976.

On January 12, 1976, I endorsed a motion made by plaintiff for sanctions pursuant to the provisions of Rule 37(b)(2) and 37(d) for failure of the defendant to comply with prior orders of this Court relating to the production of certain documents by defendants and relating to the taking of the defendant's deposition.

That order of January 12th, as I indicated, was an endorsement on the motion and it rejected a proposed order prepared by Magistrate Schreiber on December 9th which would have extended the time of the plaintiff to complete pretrial discovery for another ninety days and again permit the defendant an opportunity to produce certain documents and appear for the taking of a deposition on January 12th.

On January 12th, I gather the defendant did not appear for its deposition—

Mr. Parsons: That is correct.

The Court: —in accordance with the proposed order. And in addition it appears that after the parties were notified of the Court's January 12th order, the defendant decided to appear the next day, the 13th or the 14th, for the taking of the deposition; is that so?

Mr. Horowitz: Your Honor, before I respond and attempt to clarify the situation, because, respectfully, the Court has a misapprehension here, I wonder if the Court has my actual motion papers for reconsideration.

The Court: Yes, I do.

Mr. Horowitz: Firstly, your Honor, the order submitted by Magistrate Schreiber was not prepared by Magistrate Schreiber; it was prepared by my friends on the other side of the table. Magistrate Schreiber had suggested it and all of us agreed to it and Mr. Mannis prepared it.

Secondly, your Honor, it directed that Mr. Fullana of the defendant appear on January 22nd, not on January 12th. I have it in front of me, the order recommended by Magistrate Schreiber.

I was advised late in the week of January 5th that Mr. Fullana would be coming to New York the week of January 12th, and he asked me if it was possible for me to arrange for his deposition to be taken on January 14th, which was last Wednesday.

I called—I forgot whether it was Mr. Parsons or Mr. Mannis, but it was one of them, I believe it was Mr. Parsons—and asked him if they would consent to take Mr. Fullana's deposition on January 14th. They said to me they would take it, they would consent to taking it.

Later that same day, January 12th, late in the afternoon Mr. Parsons called me, after agreeing to take the deposition on the 14th, and said to me, in effect, that he had just learned that your Honor had entered the endorsed order, the handwritten endorsed order, of January 12th rejecting the proposed order submitted by Magistrate Schreiber and directing a default judgment, and Mr. Parsons indicated to me that in light of that action by the Court he did not feel it would be appropriate to take Mr. Fullana's deposition on January 14th.

So it is therefore incorrect, your Honor, with all possible respect, to suggest that we did not produce Mr. Fullana in accordance with the proposed order of Magistrate Schreiber. We in fact endeavored to produce him earlier

than that order called for and we would have, and both sides were proceeding on the assumption that we would—

The Court: You say that Magistrate Schreiber's order calls for Mr. Fullana's deposition to be taken on January 22, 1976 as opposed to January 12th?

Mr. Horowitz: Yes, your Honor.

The Court: Well, you attached a copy of the order here, on the bottom of page 2, and it says January 12th, in the copy you furnished me.

Mr. Horowitz: That is the wrong one, your Honor. This is the order as prepared by Mr. Mannis. The order as recommended by Magistrate Schreiber contained revisions by Magistrate Schreiber, and here is the Magistrate's order and you will see that what he did was, in handwriting, to change from January 12th to January 22nd and submitted that proposed order your Honor has in front of you—

The Court: Is that right?

Mr. Parsons: In part, yes. I would have some things to add to it.

The Court: It is not initialed here.

Mr. Horowitz: Your Honor, Magistrate Schreiber's memorandum to your Honor, attached to which is the same order, and his memo is dated the 10th of December, says, in effect: If you people have objections to this order I am proposing to Judge Motley, please let her know in writing by filing papers not later than December 20th.

And nobody ever said they objected to that order.

The Court: Of course, January 20th was Monday.

Mr. Horowitz: We are talking about December, your Honor.

The Court: Let me see a copy of his memorandum so I can get the date clear in my mind.

Mr. Horowitz: That is also attached to the motion papers, your Honor. This is Magistrate Schreiber's memorandum of December 10, 1975. He gave us until December 20th to object to the order.

The Court: Now that we have clarified those dates, on January 12th, after receiving Magistrate Schreiber's memo to me of December 10th with his proposed order and the proposed revised date for taking the deposition of Fullana, revising the date from January 12th to January 22nd, the Court entered an order rejecting the Magistrate's report and notified the plaintiff's counsel to submit an order granting a default judgment in this case.

The reason for that is that this case is on a trial calendar, is it not?

Mr. Horowitz: I don't believe it is, your Honor.

The Court: All 1973 cases are not on that calendar?

Mr. Parsons: You sent us an order—

The Court: I would like to see the order relating to 1973 cases.

Mr. Parsons: I am not sure it was an order. You sent us this piece of paper, Judge, and I assume a copy went to the defendant—

The Court: Yes. I have reference to this memorandum dated October 3rd relating to 1972 cases, that is, the latter half of 1972, and all 1973 cases, which went to all counsel in those cases, and with respect to that the memorandum notifies all counsel in '73 cases that all pretrial procedures are to be completed by December 1st, all pretrial memos are to be filed by January 15th, and all pretrial orders are to be submitted by January 30th.

This case fell into that category, and I reviewed the file in the case and the proposed order of the Magistrate, which

recited the history of the plaintiff's efforts to get this pretrial discovery over with, and the Court, as I indicated, rejected the Magistrate's proposed order and granted the relief originally requested.

I gather from your letter, Mr. Horowitz, that your suggestion is that the plaintiff is not pressing for the relief originally requested, is that it? Is that the purpose of this motion to reconsider?

Mr. Horowitz: That is not quite it. My letter, as opposed to my motion, relates to the order they submitted on January 14th per the direction contained in your Honor's order of January 12th.

All that the letter says is that I request that your Honor postpone consideration of their proposed order of January 14th pending your review of my motion for reconsideration of the order of January 12th and the determination of—

The Court: Well, we are now reviewing it. What is your reason why the proposed order I directed the plaintiff to submit should not now be signed?

Mr. Horowitz: The reason was that I did not think that certain critical facts were made available to the Court and that on consideration of those facts the Court might wish to rethink the resolution contained in the endorsed order of January 12th, specifically that from December 1, 1975, the date of the last conference before Magistrate Schreiber, through and including January 12th of this year, when we were talking with counsel for plaintiff about taking the deposition of Mr. Fullana on January 14th, they and we were proceeding on the assumption that Magistrate Schreiber's proposed order would be signed by the Court.

The Court: Let me ask you this. The Court had not signed that order?

Mr. Horowitz: That is correct.

The Court: Are you suggesting the Court is bound by the report of the Magistrate?

Mr. Horowitz: I would not presume to suggest that, your Honor. I appreciate that the Court has discretion to accept or to reject or to modify the recommendations of the Magistrate and I am in the process of suggesting to the Court reasons why I think that the Court would want to accept the recommendation of the Magistrate.

On December 1st, Magistrate Schreiber had before him all the facts relating to the prior efforts of the plaintiff to secure discovery in this case. He also had before him my motion, cross motion, to withdraw as counsel in the case.

Magistrate Schreiber at the beginning of the meeting, and Mr. Mannis was there and he can correct me if his recollection differs from mine, said in substance, "I suggest that this problem be resolved as follows"—

The Court: Who said that?

Mr. Horowitz: Magistrate Schreiber: "I suggest that an order be prepared giving the defendant one more last chance; that Mr. Fullana be directed to appear for a deposition on a specified date in January 1976; that defendant be directed to produce the documents that plaintiff sought on another specified date in January 1976, or alternatively, affidavits from the principals of the defendant indicating that they had already made complete production of documents and had no more documents to produce" and that my motion, or my firm's motion, to withdraw as counsel would not be granted unless substitute counsel were obtained and the withdrawal and substitution of my firm and the appearance of another firm would not result in delay of the progress of this matter.

I said that was all right with me. Mr. Mannis said it was all right with him. Magistrate Schreiber suggested

that Mr. Mannis prepare the order. Mr. Mannis and I both said that that was fine with us.

Magistrate Schreiber suggested that Mr. Mannis submit a proposed order to me for my review. We both assented to that. Mr. Mannis submitted a proposed order to me. I called him on the phone immediately on receipt and review of it, the same day, and I said, "Bob, the order is fine with me. Go ahead and submit it to the Magistrate."

He submitted it to the Magistrate. Within a few days thereafter Magistrate Schreiber sent to your Honor the transmittal memo of December 10, 1975 and essentially, in substance, the very same order prepared by Mr. Mannis, with the exception of the handwritten change that your Honor noted and two of the handwritten changes, and after having considered all the facts, including the ones that I just adverted to, recommended that order for your Honor's signature, having been fully apprised of all prior developments in the case, the age of the case, the prior efforts of this plaintiff to secure discovery in the case, the fact that this is not exactly a small case, this is a case in which the plaintiff seeks $285,000 in damages, being apprised that Mr. Fullana is in Puerto Rico, the records they want are in Puerto Rico, in parts, etc., etc., and the Magistrate considered all of this and recommended—

The Court: Have all these records been produced now?

Mr. Horowitz: As far as I know, your Honor, with respect to the principal claim by the plaintiff, they have been produced, and my clients are prepared to give affidavits to that effect. Your Honor may or may not recall that on motion made by me almost two years ago the Court, back in March or April of last year, granted us permission to file an amended answer containing a counterclaim.

They have requested, although I don't believe it is the subject of any court order, production of certain documents with respect to the counterclaims. The answer is, I believe, yes with regard to their claim and not with regard to the counterclaim, although I must say that there may not be anything significant in the way of documents relating to the counterclaim.

The Court: Let me ask you this, then: Have your clients submitted an affidavit that they have complied or that there are no other documents to be produced?

Mr. Horowitz: My clients haven't but are prepared to do so.

One further fact was that Mr. Fullana was physically present in my office on January 13th. He came there with the avowed purpose of discussing his testimony with me in preparation for the session that had been arranged for January 14th, and that date, a week or so in advance of the date contained in the Magistrate's proposed order, had been cleared with Mr. Parsons and Mr. Mannis.

The Court: Was there a date set for your client to file an affidavit that all documents had been produced as requested?

Mr. Horowitz: Yes. If your Honor will look at the proposed order of the Magistrate, it provides that that be done by January 15th.

The Court: Was that done by January 15th?

Mr. Horowitz: That was not done January 15th. Nothing has been done since January 12th because of the Court's order of January 12th and the fact that it would be an exercise in futility, I suppose, to do anything until we know what the status is of the case.

If a default judgment is going to be granted, then there is no sense in preparing affidavits. If it is not going to be

granted and we are going to proceed, we will immediately file such affidavits.

The Court: Is there some reason why such an affidavit could not have accompanied your motion for reconsideration? You say the man was here when?

Mr. Horowitz: January 13th.

The Court: Is there some reason why you couldn't have attached an affidavit saying that all documents had been turned over?

Mr. Horowitz: There is no reason, your Honor, other than, quite candidly, I suppose the answer is I didn't think of it on January 13th, because I had a rather enormous problem to deal with created by the Court's order of January 12th.

The other people who were supposed to sign such affidavits, Mr. Berger and Mr. Cohen, are both in New York City and there is no particular reason why late in the day on the 14th or on January 15th itself those affidavits could not have been delivered to counsel for plaintiff.

I will report to the Court that when I spoke to—

The Court: January 22nd is tomorrow. Where is Mr. Fullana now?

Mr. Horowitz: He is in Puerto Rico. I called your Honor's chambers—I forget whether it was the 13th or the 14th, I believe it was the 13th, first thing in the morning—spoke to the law clerk, and I said we had just become advised the day before, the afternoon before, of your Honor's order of January 12th, that I have the man coming in today and I would like to have—

The Court: You have the man coming in today? What does that mean?

Mr. Horowitz: Mr. Fullana. I explained to the law clerk that this revolved about a deposition of Mr. Fullana

and Mr. Fullana was going to be in my office on January 13th in the afternoon.

The Court: How was he going to be there? How did it happen he was going to be there on January 13th?

Mr. Horowitz: Because Mr. Parsons and I agreed that his deposition be taken on the 14th.

The Court: When did you agree to that?

Mr. Horowitz: Late in the week of January 5th, the preceding week. I am sorry. I stand corrected. Early in the day on January 12th, the same day your Honor entered the order of January 12th, Mr. Parsons and I agreed that Mr. Fullana's deposition would be taken on January 14th.

I immediately advised Mr. Fullana by long distance telephone that the request that his deposition be taken on the 14th was acceded to by the counsel for the plaintiff and "I want to discuss your testimony with you and I want you in my office on the 13th," and he appeared in my office at roughly 3:30 p.m. that day.

I advised your Honor's law clerk of all this and I said the man is here, I couldn't keep him here indefinitely, I would like an audience with the Court, a conference, I advised Mr. Parsons I would make such request.

The law clerk asked me to hold the phone, that he was going in to see your Honor. He came back several moments later and said that your Honor did not want to see us in a conference, that anything I had to say I should say in a motion.

I made the motion on January 15th. The man returned to Puerto Rico, I believe, on January 15th or perhaps late in the day of the 14th.

The Court: What prevented you from making the application on the 12th of January, after you spoke to my law clerk and he told you to put it in writing?

Mr. Horowitz: I didn't speak to him on the 12th, your Honor. I spoke to him on either the 13th or the 14th. Perhaps counsel for the plaintiff recalls. I spoke to them late in the day—

The Court: You just said late in the day of the 12th or earlier in the day of the 12th you spoke to them, and then I notified them of the endorsement on this motion.

Mr. Horowitz: I believe they advised me late in the day on the 12th and I believe, although I am not sure, that it was that conversation late in the day of the 12th where I said to them, "I am going to call Judge Motley's chambers first thing in the morning on the 13th."

The Court: As I have said, this motion of yours was filed on the 15th of January, two days later, and your letters is dated January 15th also.

Mr. Horowitz: On the 13th Mr. Fullana was in my office. As I had told counsel for plaintiff on the 12th, in our late afternoon conversation, I would discuss with him whether there was any possibility of resolving this matter, that I would endeavor to get back to Mr. Parsons after talking about that subject with Mr. Fullana.

I called Mr. Parsons late in the day on the 13th and I said there was no possibility of resolving the matter, and it may have been early in the morning on the 14th that I called your Honor's law clerk. I am not sure. Perhaps counsel recalls. But I am confused as to whether I called the Court on the morning of the 13th or the 14th.

But I think in the circumstances, your Honor, I moved expeditiously to file these motion papers. I filed them either one day or two days after speaking to your Honor's law clerk. I think it was one day.

The Court: Let me ask you this: What accounts for your client's failure to appear previously for his deposition, prior to the Magistrate's proposed order—that is, as to Mr. Fullana? What accounts for his failure to appear for more than a year? I gather he was notified sometime in December or September—

Mr. Horowitz: I made a motion to withdraw as counsel in this case, and the reason I made that motion was that I had not been getting cooperation from my client, especially from Mr. Fullana.

I don't think, in view of the confidence of attorney-client, that I should comment any further than I have in the motion papers.

The Court: The evidence is that your client wilfully failed to appear for the taking of his deposition, and I am trying to find the date now when he was first notified—September 25, 1973. That is on page 2 of the affidavit of Judson Parsons dated June 11, 1975. On page 2 of that affidavit he cites an effort to get this pretrial discovery completed and says,

"Those efforts included, on September 25, 1973, a notice of deposition of defendant, Martin Cohen, Jack H. Berger and Pedro Fullana, all of whom acted on behalf of defendant in connection with the matters involved in this litigation."

The Magistrate's memorandum comes a year later, doesn't it?

Mr. Horowitz: Your Honor, I think there is one other factor we have to throw in that hopper to make it complete. In 1974 I made a motion, early in '74, March or April, for the following relief: to transfer this case to the district court in Puerto Rico, for permission to amend the answer and interpose a counterclaim, and for the Court to direct that Mr. Fullana's deposition be taken in Puerto Rico.

One year later, approximately, this Court decided that motion, denied the application to transfer it to Puerto Rico—

The Court: What was the date of that?

Mr. Horowitz: March or April 1975. I don't know the precise date. The Court directed that we have permission to amend our answer and interpose a counterclaim and that Mr. Fullana's deposition be taken in New York City.

The Court: That was April '75.

Mr. Horowitz: March or April.

Mr. Parsons: March 31st was the denial.

The Court: What year?

Mr. Parsons: '75.

Mr. Horowitz: So it was not resolved until March of '75, your Honor.

The Court: Then what accounts for your defendant's failure to appear from March '75 to December '75

Mr. Horowitz: Your Honor, I suppose that it would not be appropriate for me to comment any further, in view of the confidence of attorney-client, other than to say—

The Court: If he has a justifiable excuse for not appearing, I don't know that you can also invoke the attorney-client privilege. He is here seeking relief on the ground that he has some good reason, I assume, for not appearing. So I don't know that you can ask for relief in the court and at the same time stand on a privilege. You can't do that.

Mr. Horowitz: Your Honor, I am not here to attempt to justify Mr. Fullana's failure to appear between March of 1975 and the date of the conference before the Magistrate.

The Court: We are here because I am concerned with it. If you don't want to justify it, you don't have to, but that is why we are here, to determine whether a default

judgment ought to be entered against your client, and, as far as I can see, the record is clear that your client wilfully failed to appear for his deposition, and that is why a default judgment is going to be entered against him, notwithstanding the recommendation of the Magistrate, because I disagree with it, that he is entitled to a second chance.

So for that reason the relief originally requested against your client is going to be granted unless, of course, the moving party doesn't wish that.

Mr. Parsons: I certainly do, your Honor.

Mr. Horowitz: Your Honor, let me say that all of this has been before the Magistrate. The man, notwithstanding the prior situation, was in my office, was willing to cooperate, was willing to comply with the various suggested orders of December of this year, that plaintiff's counsel were willing to go along with that, did not claim that they were prejudiced, and I think in the circumstances, from December 1, 1975 through and including January 12th, they never asked for a default judgment, and I think it is a bit unusual to grant—

The Court: I am asking now if they are asking for it. Are you asking for a default judgment?

Mr. Parsons: Yes, your Honor.

Mr. Horowitz: Your Honor, I know what they are asking for now, and I suppose I would do the same thing, in light of your Honor's handwritten order of January 12, 1976. But that doesn't alter the fact that between the conference of December 1st and January 12th of this year they never said one word about a default judgment, the Magistrate never said one word about a default judgment, Mr. Fullana came here for his deposition, plaintiff did not claim they were prejudiced, and we are not dealing with a hun-

dred dollars or a thousand dollars; the relief requested in the complaint is $285,000.

The Court: That is all the more reason why the defendant should have appeared. That is precisely why he should have been here, and I think the record is clear that he wilfully failed to appear for his deposition.

There is no excuse in the world why he couldn't have filed an affidavit setting forth that all the records requested had been produced.

Mr. Horowitz: That was supposed to be filed by January 15th, your Honor—

The Court: You were acting on the assumption I was going along with that. You didn't have any court order permitting that and your client had plenty of time, even before January 12th, to submit such an order and get over here and get his deposition taken and get on with this, particularly in view of the fact that this was a 1973 case which was encompassed within the Court memorandum relating to these cases which was sent to all counsel saying that these cases are going to be tried starting April 1st.

So this case was involved in that, in addition, and that is all the more reason why you should have gotten him here, which you didn't.

Mr. Horowitz: I did get my client here.

The Court: That was long after the Magistrate's report. When this notice came out in October was the time to see that your client was complying with the Court's order.

Mr. Horowitz: Your Honor, there had been various other proposals of the Magistrate that had been acted on, I thought rather routinely, by the Court, and I proceeded on the assumption that this one would as well. I don't know what else there is to say.

The Court: Thank you, gentlemen.

Mr. Horowitz: Your Honor, I have two requests. Firstly, if your Honor is going to sign the order—

The Court: I have already signed it, just a minute ago.

Mr. Horowitz: Your Honor, I would like to make a couple of comments on the order itself.

Firstly, that order contains no reference to the proceedings before Magistrate Schreiber or the proposed order. There is no secret that I am going to the Court of Appeals, and I want—

The Court: The record is clear. That is in the record. And I said in my order of January 12th, "The Court rejects the proposed order prepared by Magistrate Schreiber on December 9, 1975 and grants the plaintiff's motion for sanctions against defendant for their refusal to comply."

So there is no attempt to hide the fact that the Magistrate suggested the order that he did on December 9th. It is right in there that I rejected his report, and I find that his report, as I have indicated, comes months after your client failed to appear for his deposition.

As I told you, it is my ruling that I am not bound by the Magistrate's reports in these matters. The Magistrate is not a district judge. And I have gone over this, and the record is extensive and clear that your client wilfully disobeyed the orders of the Court.

So you can go to the Court of Appeals and we will find out whether your client can wilfully disobey a court order.

Mr. Horowitz: One final request, if I may, your Honor. I would like to request a thirty day stay of enforcement of the judgment that will ultimately be entered. I will be filing a notice of appeal and proceeding with an appeal.

The Court: Well, you have to file a bond for an appeal which would automatically stay this judgment, wouldn't it?

Mr. Horowitz: I have to file a notice of appeal within thirty days after the entry of the judgment. What I am requesting is a thirty day stay of the judgment, which is the time within which I would file a notice of appeal and the bond.

The Court: You want a thirty day stay of the judgment pending the filing of a notice of appeal?

Mr. Horowitz: Yes, your Honor.

The Court: Do you wish to be heard on that?

Mr. Parsons: Your Honor, I guess—

The Court: I think he can't enforce the judgment until the time for appeal has expired.

Mr. Horowitz: That is not true, your Honor.

Mr. Parsons: I would like to suggest, your Honor, since he will have to file a bond to appeal to stay things, that I guess I would not object to that. But I think your Honor awarded us counsel fees.

The Court: Yes, counsel fees and expenses.

Mr. Parsons: I suggest that that not be stayed, your Honor, but I suggest that one of the ways to make these discovery rules work is that when those things are imposed that they be dealt with expeditiously and paid expeditiously.

This doesn't go into our pocket but goes into the client's pocket. The client has incurred those expenses and will be reimbursed for them.

The Court: It seems to me—I guess we could get the rules out, but it seems to me—you can file a notice of appeal and the required bond and that automatically stays this judgment and that is what you should do.

Mr. Horowitz: What I am saying to the Court is that you don't file a 300 some-odd thousand dollar bond overnight. You have to satisfy bonding companies—

The Court: There is a ten day rule, I am sure, at least, with respect to the entry of any judgment here. You check on the rules and write out whatever you want me to do. But, as I have indicated, I think what you should do is file a notice of appeal and the required bond, which would stay this judgment.

Thank you, gentlemen.

Appendix D

Opinion of Circuit Court of Appeals in *United States* v. *Stein*

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 322—September Term, 1976.

(Argued September 15, 1976 Decided October 22, 1976.)

Docket No. 76-1299

UNITED STATES OF AMERICA,

Appellee,

—against—

SIDNEY STEIN,

Defendant-Appellant.

Before:

LUMBARD, MANSFIELD and MULLIGAN,

Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York, Constance Baker Motley, *Judge*, denying reconsideration of defendant's motion challenging the legality of consecutive sentences totalling 10 years imprisonment and fines of $25,000 imposed upon his plea of guilty to conspiracy, 18 U.S.C. §371, securities fraud, 15 U.S.C. §§78j, 78ff and Rule 10b-5, and interstate transportation of unregistered securities, 15 U.S.C. §77, on grounds of denial of due process.

Reversed and remanded with directions to vacate sentence and resentence the defendant.

ANGELO T. COMETA, Esq., New York, N.Y. (Louis Nizer, Esq., Perry S. Galler, Esq., Jonathan D. Warner, Esq., Phillips, Nizer, Benjamin, Krim & Ballon, New York, N.Y., of counsel), *for Defendant-Appellant.*

LAWRENCE B. PEDOWITZ, Assistant United States Attorney (Robert B. Fiske, Jr., United States Attorney for the Southern District of New York, Frank H. Wohl, Assistant United States Attorney, New York, N.Y., of counsel), *for Appellee.*

MANSFIELD, *Circuit Judge:*

Sidney Stein appeals from an order of the Southern District of New York, Constance Baker Motley, *Judge*, denying reconsideration of his motion challenging consecutive sentences totalling 10 years imprisonment and fines amounting to $25,000, which were imposed after he had pleaded guilty to charges of conspiracy, 18 U.S.C. §371, securities fraud, 15 U.S.C. §§78j, 78ff and Rule 10b-5, and interstate transportation of unregistered securities, 15 U.S.C. §77e, and had cooperated extensively with the government, testifying against co-defendants, some of whom were convicted and received substantially lesser sentences than that imposed upon Stein. He contends that the sentence was both excessive and illegal. Because the harsh sentence was imposed by the sentencing judge under an apparent misapprehension as to certain material facts, because she failed to permit appellant and his counsel to be heard when they attempted immediately after imposition of the sentence to address the court, and because the defendant was furnished by the court with a materially incorrect impression of the Probation Officer's recommenda-

tion, we hold that there was a denial of due process. Accordingly the sentence is vacated and the case remanded to the district court for resentencing.

Prior to the filing in 1974 of the indictment in this case Stein, now 50 years old, had been a principal figure in numerous securities law violations, including frauds and stock manipulations, which dated back to the early 1960s and continued until approximately 1972. Despite his involvement in these illegal activities he apparently began cooperating with the government in the late 1960s, furnishing information with respect to the conduct of others in certain security frauds, manipulations and other crimes. On May 27, 1971, after a jury trial before Judge Frederick vP. Bryan in the Southern District of New York, he was convicted of federal security law violations based upon manipulation of the stock of the Buckeye Corporation in 1960 and 1961 and was sentenced to a term of two years imprisonment. However, he continued his cooperation with federal authorities, testifying in various other trials in the Southern District of New York in 1971, 1972 and 1973 and acting as an undercover agent for the Bureau of Narcotics and Dangerous Drugs in obtaining evidence of trafficking in narcotics on the part of a California attorney. As a result of this cooperation Judge Bryan, on January 30, 1973, reduced Stein's sentence to time already served (approximately 90 days) and placed him on probation for five years, on the understanding that he would continue to cooperate with federal law enforcement authorities, which he did.[1]

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1 On February 5, 1973, one week after he was sentenced by Judge Bryan in 66 Cr. 732, Stein was sentenced by Judge Charles Brieant of the Southern District of New York to pay fines totalling $3,750 upon his plea of guilty on the same date to three counts of an indictment charging him with perjury in proceedings held pursuant to the SEC's application to enjoin violation of the federal securities laws in the sale of stock of Radio Hill Mines.

On June 4, 1974, a grand jury in the Southern District of New York filed the present indictment against Stein and nine others, charging them in 20 counts with a 1968-69 conspiracy to violate the federal securities laws and mail fraud statutes in the sale of unregistered stock of Stern-Haskell, Inc. and various substantive violations, including employment of schemes to defraud, use of manipulative and deceptive devices in the sale of stock, and obtaining money and property by means of untrue statements. See *United States* v. *Rubinson,* —— F.2d —— (2d Cir. April 8, 1976), Slip Opin. 3119. The charges were based upon a scheme devised and carried out in 1968 and 1969 for the marketing of some 200,000 unregistered Stern-Haskell shares. On January 9, 1975, Stein pleaded guilty to Counts One (charging all defendants with conspiracy in violation of 18 U.S.C. §371), Seven (use of the mails to sell Stern-Haskell stock in violation of Rule 10b-5 and 15 U.S.C. §§78j and 78ff), and Fourteen (sale of unregistered shares of Stern-Haskell stock in violation of 15 U.S.C. §§77e and 77x).[2]

Trial of Stein's co-defendants commenced on January 22, 1975. Stein, continuing to cooperate with the government, testified as a government witness for six days. The jury found four defendants guilty and acquitted three.[3]

On March 28, 1975, Stein appeared before Judge Motley for sentencing. The government prepared and submitted to the court a sentencing memorandum describing Stein's

2 Before the guilty plea was entered the parties revealed to the court an understanding between Stein and the government to the effect that if Stein continued to cooperate with the government he would not be prosecuted for any other prior crimes revealed to it and that the nature and extent of Stein's cooperation would be made known to the court at the time of sentencing.

3 For a full statement of the facts see *United States* v. *Rubinson, supra,* Slip Opin. 3120-30.

cooperation, including his testimony in various cases (including that in *United States* v. *Quase,* 73 Cr. 80, and his testimony before the grand jury and at trial in the present case) and his cooperation with the FBI and the Internal Revenue Service.[4] Judge Motley also had before her a copy of the pre-sentence report prepared by the U.S. Probation Officer for use by Judge Bryan in the 1971 sentencing after Stein's conviction in the trial before him (66 Cr. 732) and a supplemental pre-sentence report prepared by the Probation Officer for the present case, dated March 12, 1975. Using a form customarily employed by the U.S. Probation Officer in the Southern District of New York, each of these pre-sentence reports sets forth pertinent data, including a description of the offense for which Stein had been convicted, a statement of his version of the events, his prior criminal history, personal and background data, emotional and physical factors, business history, pending information, finances and—a matter of considerable significance in the present case—the Probation Officer's "Evaluation" or "Evaluative Summary" in which the Officer frequently makes a recommendation with respect to the sentence to be imposed.

At the sentencing hearing Stein's counsel urged the court to place Stein on probation, pointing out that Judge Bryan had followed this course in the earlier case and that Stein had since conducted himself in a lawful manner, cooperating extensively with various governmental agencies. The government rested on its sentencing memorandum. Stein, exercising his right of allocution, stated that he had rehabilitated himself and would continue to cooperate with the government. Judge Motley, after reviewing Stein's criminal record, stated that she concurred in the evalua-

4 Before sentencing Stein in open court, Judge Motley held a robing room conference with counsel and Stein, in which Stein's cooperation with the government was also described by counsel.

tion of the September 14, 1971, pre-sentence report prepared by the U.S. Probation Officer for Judge Bryan. She then read verbatim that evaluation. After reviewing Stein's fraudulent behavior and describing him as a major manipulator of stocks, the Evaluative Summary concluded that Stein had shown "no remorse for his involvement," that he would "continue to act in a fraudulent and manipulative manner," that he "deserves no consideration despite his so-called cooperation in other cases," and that he was "acting in his own self-preservation so that he could not himself be criminally prosecuted." It concluded, "a commitment and fine in his case is recommended on Stein's activities alone. Additionally a commitment hopefully will forewarn others that this type of offense could result in serious consequences." [5]

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5 The following portion was quoted by Judge Motley in open court:

"'Stein has developed a rightly earned reputation among the Securities and Exchange Commission as one of the major manipulators of stocks. His method of operation is simply to acquire shell companies for which he gets a percentage, obtains underwritings for them and then creates an artificial market. When the price is right, Stein "dumps" his stock causing havoc for the other investors, some small and big. He operates under the guise of respectability reinforced by his pervasive and glib personality which makes him formidable opposition. There appears little doubt that Stein is one of the major offenders in this field. There is a history and pattern of this behavior with three cases, including one for forgery about to break open in this court, all leading to considerable prosecution.

"'In all cases it appears that Stein emerges as the principal and the one who dominates and controls every and all situations. Since the filing of the indictment on the instant offense in 1966 Stein has been quite active.

"'Another indictment was filed in 1968 (dismissed) and two injunctions were issued with respect to Stein's violations of securities laws in 1970. Although outwardly courteous and cooperative during the investigation Stein, in our opinion, was completely vague and guarded, especially concerning his finances and current business. Stein, a complex man, operates in a complex field and commits complex offenses. Not only a "merger and acquisition man", which in itself can be legitimate, Stein is one-third owner of a hotel and restaurant in Miami Beach, Florida.

Although Judge Motley mentioned in passing that she had read the Probation Officer's *supplemental* pre-sentence report prepared for her sentencing of Stein, which updated the 1971 report, she did not describe the contents of the supplemental report other than to state at the pre-sentence chambers conference that it "doesn't contain much additional information." However, the Probation Officer's Evaluative Summary attached to the supplemental report as a separate sheet, in sharp contrast to that forming part of the earlier report, states:

> "Stein admits his guilt, verbalizes remorse, and has been cooperating with the Government.
>
> "In view of the foregoing, it is respectfully recommended that this defendant be placed on probation."

"'Despite these surface qualities of respectability Stein's several indictments and injunctions, both past and present, tend to cast certain sinister implications about his overall activities, including his name being mentioned in three cases with men reputed to be on the organized crime list.

"'In any event, it certainly appears that Stein has learned little about himself in the process and will continue to act in a fraudulent and manipulative manner. He shows no remorse for his involvement and indicates that he is innocent not only of the instant offense but of other offenses.

"'Stein deserves no consideration despite his so-called cooperation in other cases. In each case it appears Stein was acting in his own self-preservation so that he could not himself be criminally prosecuted.

"'In our opinion, whatever has been uncovered by Stein until now is but the periphery of his true activities and manipulations. Stein despite three unsolicited letters attesting to his character (attached) is not a deserving candidate for probation.

"'Stein is one of the better known men in this field, not only to government agencies and courts, but among Wall Street brokers, dealers, attorneys, etcetera.

"'A commitment and fine in this case is recommended on Stein's activities alone. Additionally, a commitment hopefully will forewarn others that this type of offense could result in serious consequences.'"

It does not appear that this supplemental report was ever made available to or read by counsel. For reasons suggested below the Evaluative Summary quoted above may not have been read by Judge Motley. Had it been furnished to counsel, we are confident that the quoted portion, which was of considerable significance in view of Judge Motley's quotation of the evaluation from the earlier report, would have been called to her attention.

Following her reading of portions of the 1971 Probation Office report, Judge Motley sentenced Stein to the maximum sentence that could be imposed on each of the three counts to which he pleaded guilty: 5 years and a committed $10,000 fine on Count One, 2 years and a committed $10,000 fine on Count Seven to run concurrently with the sentence of Count One, and 5 years and a committed $5,000 fine on Count Fourteen to run consecutively to the sentence on Count One. As a result, Stein was sentenced to 10 years imprisonment and payment of committed fines totalling $25,000, based on imposition of consecutive sentences with respect to the same criminal course of conduct.

When Stein's counsel, undoubtedly taken aback by the severity of the sentence, asked to be heard the court replied "No, the defendant is remanded," adding "We are not going to have anymore attempted suicides or anything else with Mr. Stein. We have been through that." Similarly when Stein asked "May I say something, your Honor?" the court replied "The defendant is remanded."

On July 28, 1975, Stein filed a "Motion for Mitigation" accompanied by a memorandum prepared by his counsel which argued (1) that the court, by relying so heavily on the negative evaluation quoted from the out-dated 1971 pre-sentence report instead of considering Stein's intervening cooperation and rehabilitation, had been under a mistaken impression as to Stein's current motivation and the genuineness of his post-1971 rehabilitation, (2) that

the court had imposed sentence in the mistaken belief that Stein had attempted to get his sentence in the 1971 case "fixed," and (3) that the court had acted under the misapprehension that Stein, after being sentenced by Judge Bryan in 1971, had engaged in "an attempt to avoid going to jail by feigning suicide." The memorandum made an effort to correct these possible misimpressions by setting forth pertinent facts in detail.

The evidence as thus adduced indicated that Stein had not engaged in any illegal activities since at least 1972 and that he had cooperated extensively with the government, allowing himself to be used in an undercover capacity, even after he learned in March 1974 that he was likely to be indicted in the present case, thus indicating that he was not motivated solely by self-preservation. With respect to the charge made by other defense counsel during the trial (when Stein was testifying for the government) that Stein had attempted to "fix" his sentence in the 1971 case, his counsel brought out that Stein had reported the facts to the government and had acted as an undercover informant in an effort to obtain evidence against those claiming to have influence with the court in the earlier case. As for the statement that Stein had "feigned suicide," his counsel offered proof that the suicide attempt was genuine, that Stein had a long history of psychiatric illness which grew worse as he faced imprisonment and that on October 12, 1972, before boarding the plane on which he consumed the overdose of pills, his life had been threatened. The psychiatric study made shortly thereafter by the U.S. Medical Center, Springfield, Mo., supported Stein's claim of psychiatric illness.[6]

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6 The United States Medical Center Report stated:

"There is professional medical unison suggesting that Stein is but a step away from total personality disintegration and possible psychosis.

* * * * *

Stein's counsel asked for an oral hearing on his motion directed toward the sentence imposed by Judge Motley. In response to his motion the government filed a memorandum recommending that, in view of Stein's cooperation since 1972, which was described as "extensive," and the absence of any "reliable information that Stein has committed any crime since 1972," the sentence be reduced but not below five years imprisonment and the $25,000 fine imposed by the court. On October 22 the court denied Stein's motion without hearing and without making any findings of fact with respect to the matters claimed to be the subject of misapprehension by the court. The parties did not learn of the denial for a couple of months.

On January 23, 1976, Stein filed a petition for reconsideration of the earlier decision denying his motion directed toward the sentence and asked for oral argument. On March 9, 1976, Judge Motley denied the petition without hearing or findings in a cryptic endorsement "Petition for reconsideration denied. See Court's statement at time of sentence." From this order Stein appeals.

"If he is not immediately subjected to an extended period of psychotherapy and supportive counseling in a structured setting, he could very easily lose contact with reality.

"Recent psychological testing and psychiatric observation substantiate that Stein does possess a degree of paranoia which is on the verge of developing into schizophrenic psychosis. His depression is almost at the psychotic level. At this time he is still in contact with reality but the possibility of incarceration poses such a threat to him that he could easily decompensate at any time. The possibility of further suicide attempts is realistic in this case, as it is believed that the recent previous gesture was prompted by the fear of confinement, and incarceration may yet be imminent.

"At the Medical Center he has been observed as suffering from a very severe affective disorder, as depicted in available reports. As suggested above, total personality disintegration has not occurred, yet he is tenuously close to a total break from reality."

Discussion

The threshold question is whether the order denying reconsideration of Stein's motion directed toward his sentence is reviewable. If the motion were limited to a claim that the sentence was excessive, we would be forced to deny review in accordance with the general principle recently restated by us in *United States* v. *Seijo*, —— F.2d —— (2d Cir. June 24, 1976), Slip Opin. 4387, 4398:

> "The Supreme Court has recently reaffirmed the 'general proposition that once it is determined that a sentence is within the limitations set forth in the statute under which it is imposed, appellate review is at an end.' *Dorszynski* v. *United States*, 418 U.S. 424, 431 (1974)."

See also *United States* v. *Tucker*, 404 U.S. 443 (1972); *United States* v. *Brown*, 479 F.2d 1170, 1172 (2d Cir. 1973). The sentences here were within the statutory limits and cannot be set aside on the ground that they were made to run consecutively, a decision resting within the trial judge's discretion. *Hartson* v. *United States*, 14 F.2d 561 (2d Cir. 1926); *United States* v. *Grene*, 455 F.2d 376 (5th Cir.), *cert. denied*, 409 U.S. 856 (1972); *Gilinsky* v. *United States*, 430 F.2d 1292 (9th Cir. 1970).

On the other hand, a motion to vacate a sentence on the ground that the sentencing judge acted on the basis of erroneous assumptions or information that was materially incorrect rests on a different footing; in that case

> "[i]t is not the duration or severity of this sentence that renders it constitutionally invalid; it is the careless or designed pronouncement of sentence on a foundation so extensively and materially false, which the prisoner had no opportunity to correct by the services which counsel would provide, that renders the proceed-

ings lacking in due process." *Townsend* v. *Burke*, 334 U.S. 736 at 741 (1948).

This basic principle was recently applied by us under similar circumstances in *United States* v. *Robin*, —— F.2d —— (2d Cir. Oct. 15, 1976), Slip Opin. 5829-5846. Earlier, in *United States* v. *Malcolm*, 432 F.2d 809, 815 (2d Cir. 1970), we vacated a sentence on the ground that the sentencing judge had proceeded under a misapprehension as to the defendant's criminal record and had denied defense counsel and the prosecutor an opportunity to present material information bearing on the sentence, including the nature and extent of the defendant's cooperation with law enforcement authorities. There we stated:

> "Misinformation or misunderstanding that is materially untrue regarding a prior criminal record, or material false assumptions as to any facts relevant to sentencing, renders the entire sentencing procedure invalid as a violation of due process.
>
> • • • • •
>
> "There can be no question that a defendant's cooperation in the investigation and prosecution of the murder of a policeman and other serious crimes is highly material to mitigation of punishment not only because the defendant should be rewarded for his services to the community but also because cooperation with law enforcement authorities is a significant step toward rehabilitation. Clearly, therefore, Malcolm had a right to present all available information bearing on his cooperation with the authorities fully and accurately, and, correlatively, the court had a duty to listen and to give such information serious consideration." 432 F.2d 809 at 816, 817.

These principles apply with singular force to the present case. Stein's motion, although labelled one for "mitigation" was actually founded upon a claim of denial of due process based upon the court's having acted on material misinformation.[7] The motion papers, moreover, make out a prima facie case of illegality, revealing that the sentencing judge was under a misapprehension as to at least two material facts when she sentenced Stein. According to the transcript, Judge Motley assumed that Stein had unqualifiedly participated in an attempt to "fix" his earlier case before Judge Bryan. If true this was a material fact that could well have led the judge to impose the unusually severe sentence. The view that Stein had "feigned" suicide following imposition of sentence by Judge Bryan, while not as material as the supposed "fix," could nevertheless have been relevant to the sentence imposed and damaging to Stein since, if accepted as true, it would indicate that he had not been rehabilitated and that he was willing to engage in fraud upon the court in order to escape justice, thus confirming the Probation Officer's earlier adverse evaluation. Furthermore, the fact that the trial judge expressly referred to these matters upon imposition of sentence indicates that she probably considered them to be material; otherwise there would not have been any point in her mentioning them.

Thus the sentencing judge was confronted with more than a request to rebut some hearsay statements in a presentence report, see, e.g., *United States* v. *Rosener*, 485 F.2d 1213, 1230 (2d Cir. 1973), *cert. denied*, 417 U.S. 950

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7 The motion papers failed to state the basis of Stein's invocation of the court's jurisdiction. To the extent that the motion may be deemed one under Rule 35, F.R.Cr.P.; for reduction of sentence on grounds of harshness, it may have been time-barred, but the legality of the sentence, either under Rule 35 or 28 U.S.C. §2255, could be raised at any time and was a matter within the district court's jurisdiction.

(1974); *United States* v. *Robin, supra.* Here she was faced with evidence not controverted by the government to the effect that assumptions expressed by her at the time of sentencing with respect to material matters had been either partially or wholly incorrect. Under these circumstances the judge owed a duty either to explain that she had not been influenced by them or, if she had been, to make findings of fact after examining the evidence, which might or might not require a hearing. See *United States* v. *Needles,* 472 F.2d 652, 657-58 (2d Cir. 1973). If the evidence confirmed her assumptions, no further action would be required; if, on the other hand, the judge found that her material assumptions had been incorrect, it would become necessary to vacate the sentence[8] and resentence the defendant. Instead, Judge Motley denied Stein's motion without any findings, content to rest on what she had stated at the time of sentencing.

This failure to reopen the matter when it was called to the court's attention by a post-sentencing motion underscores the trial judge's earlier error in refusing to permit Stein or his counsel to be heard immediately following the judge's remarks and imposition of sentence. We recognize that Judge Motley had at an earlier point in the sentencing permitted the defendant and his counsel to be heard at some length. But that was before her remarks to the effect that Stein had attempted to get the earlier "sentence fixed" and had made "an attempt to avoid going to jail by feigning suicide," which immediately preceded her imposition of sentence. Furthermore, in denying Stein's counsel the

8 Further support for appellant's position is found in the fact that after the claim that appellant had attempted to fix the sentence before him had been explored in depth by Judge Bryan upon appellant's motion for reduction of sentence, Judge Bryan apparently found no impropriety on appellant's part since he reduced the two-year sentence imposed upon Stein to time already served.

right to be heard for a "moment" immediately after sentence was imposed the judge remarked "We are not going to have anymore attempted suicides or anything else with Mr. Stein. We have been through that," thus emphasizing the importance of this matter in relation to the sentence imposed. While we appreciate the severe pressures under which the sentencing judge functions in this heavily overburdened court and that our criticism is of necessity the product of hindsight, it was nevertheless a denial of due process to refuse to hear Stein and his counsel in rebuttal. See, e.g., *United States* v. *Powell,* 487 F.2d 325, 329 (4th Cir. 1973); *Collins* v. *Buchkoe,* 493 F.2d 343, 345 (6th Cir. 1974).

The sentence here must be vacated on still another ground: the trial judge's failure, after reading the strongly adverse evaluation written by the Probation Officer in his 1971 report (which took the view that Stein was incorrigible and should be committed), to disclose that in his later 1975 supplemental report the Probation Officer, after a further study of the matter in the light of intervening events (including Stein's remorse and cooperation), had recommended that Stein be placed on probation. Judge Motley's verbatim reading in open court of the earlier detailed evaluation without revealing the later favorable one could only have created the erroneous impression that nothing had intervened to change the Probation Officer's adverse evaluation. Although the sentencing judge was not required to follow the Probation Officer's recommendation, it often constitutes one of the most important factors considered by the sentencing judge.

Once Judge Motley had revealed in detail the earlier adverse evaluation in which she concurred, fundamental fairness dictated that the more recent favorable evalua-

tion recommending probation be brought to the attention of the defendant and his counsel, neither of whom had seen it, for such comment and suggestion as they might care to make.[9] We conclude that Judge Motley must have overlooked the later favorable evaluation.[10] But even so the failure of the court to have considered this vital in-

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9 Effective August 1, 1975, Rule 32(c)(3)(A), F.R.Cr.P., was amended to provide:

> "(A) Before imposing sentence the court shall upon request permit the defendant, or his counsel if he is so represented, to read the report of the presentence investigation exclusive of any recommendation as to sentence, but not to the extent that in the opinion of the court the report contains diagnostic opinion which might seriously disrupt a program of rehabilitation, sources of information obtained upon a promise of confidentiality, or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons; and the court shall afford the defendant or his counsel an opportunity to comment thereon and, at the discretion of the court, to introduce testimony or other information relating to any alleged factual inaccuracy contained in the presentence report."

At the time Stein was sentenced by Judge Motley, however, the disclosure of the report or any part of it to a defendant or his counsel was left to the judge's discretion. The practice under this earlier version of the Rule varied according to the sentencing judge. Apparently no request was made by Stein for the sentencing reports and we therefore do not know whether the reports would have been made available to him in whole or part by the trial judge.

10 The likelihood that the later evaluation was overlooked by the sentencing judge is suggested by the fact that the supplemental pre-sentence report consists of four pages, the last of which was signed by the Probation Officer, plus a fifth page entitled "Evaluative Summary" dated on the same day as the earlier pages (3/12/75) and also signed by the Probation Officer.

It is possible that the sentencing judge, upon reaching the end of the fourth page, which bears the salutation "Respectfully submitted" followed by the Probation Officer's signature, thought that this was the end of the report and failed to turn to the next page which contains the evaluation, plus the same closing salutation and signature. Indeed, in her remarks in the robing room conference immediately preceding the sentence she described the supplemental report as "a three and a quarter page report."

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formation before imposing sentence would in itself require that the sentence be vacated. *United States* v. *Malcolm*, 432 F.2d 809 (2d Cir. 1970).

Accordingly we reverse the denial of Stein's motion with directions to vacate the sentence and to resentence the defendant. Under the circumstances, including the recognized difficulty which an original sentencing judge may have in rejecting or modifying prior conclusions and the necessity of maintaining the appearance of justice, we direct that the resentencing be conducted by a different judge. See *United States* v. *Rosner*, 485 F.2d 1213, 1231 (2d Cir. 1973), *cert. denied*, 417 U.S. 950 (1974); *United States* v. *Schwarz*, 500 F.2d 1350, 1352 (2d Cir. 1974); *O'Shea* v. *United States*, 491 F.2d 774, 778-80 (1st Cir.), *overruled as to a different* holding, *Wingo* v. *Wedding*, 418 U.S. 461, 473 n.19 (1974).

LUMBARD, *Circuit Judge* (concurring):

From Judge Mansfield's thorough and convincing discussion of the facts, it seems to me that the sentence of ten years imposed on Stein violated the Eighth Amendment prohibition against the infliction of cruel and unusual punishments. Such a lengthy sentence has rarely been imposed in a stock fraud case. To impose this sentence on a defendant who has not only pleaded guilty but in addition has assisted the government, as Stein did in the instant case, by extensive testimony, as well as by undercover work for other government agencies in other cases, is unprecedented and beyond all reason. The sentence is so severe as to be cruel and unusual under the circumstances. Hence, it cannot stand. Cf. *Hart* v. *Coiner*, 483 F.2d 136 (4th Cir.), cert. denied, 415 U.S. 938 (1973).

See also *Weems* v. *United States*, 217 U.S. 349 (1910); *Downey* v. *Perini*, 518 F.2d 1288 (6th Cir.), vacated on other grounds, 96 S.Ct. 419 (1975).

While I fully agree with all the other reasons Judge Mansfield has given which demonstrate that the district judge failed to consider the significant facts and opinions which were highly relevant to the sentence, I would set aside such a sentence as was here imposed even if the judge had properly noted this material and had given adequate opportunity for the defendant and his counsel to be heard.

In my opinion to let such a sentence stand would seriously cripple the necessary efforts of the government to secure the cooperation of malefactors without whose assistance and testimony it is often not possible to prosecute their many partners in crime. I do not overlook the government's intermediate position, doubtless made necessary by the amenities which prosecutors must observe when a judge's decision goes far beyond expectations, that the sentence should not have been longer than five years. Nor do I overlook the fact that Stein's transgressions deserve more than token punishment and the consideration that there must be substantial doubt whether anything like rehabilitation is possible for such a long-time repeated offender.

For these reasons I agree that the sentence should be vacated and the case remanded to the district court for resentencing before a different district judge.

Appendix E

Federal Rules of Civil Procedure

Rule 37. Failure To Make Discovery: Sanctions.

• • • • •

(b) FAILURE TO COMPLY WITH ORDER.

(1) *Sanctions by Court in District Where Deposition Is Taken.* If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) *Sanctions by Court in Which Action Is Pending.* If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring him to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

• • • • •

(d) FAILURE OF PARTY TO ATTEND AT OWN DEPOSITION OR SERVE ANSWERS TO INTERROGATORIES OR RESPOND TO REQUEST FOR INSPECTION.

If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with

a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c).

Rule 53. Masters

(e) REPORT.

(1) *Contents and Filing.* The master shall prepare a report upon the matters submitted to him by the order of reference and, if required to make findings of fact and conclusions of law, he shall set them forth in the report. He shall file the report with the clerk of the court and in an action to be tried without a jury, unless otherwise directed by the order of reference, shall file with it a transcript of the proceedings and of the evidence and the original exhibits. The clerk shall forthwith mail to all parties notice of the filing.

Appendix E

(2) *In Non-Jury Actions.* In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. Within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6(d). The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

(3) *In Jury Actions.* In an action to be tried by a jury the master shall not be directed to report the evidence. His findings upon the issues submitted to him are admissible as evidence of the matters found and may be read to the jury, subject to the ruling of the court upon any objections in point of law which may be made to the report.

(4) *Stipulation as to Findings.* The effect of a master's report is the same whether or not the parties have consented to the reference; but, when the parties stipulate that a master's findings of fact shall be final, only questions of law arising upon the report shall thereafter be considered.

(5) *Draft Report.* Before filing his report a master may submit a draft thereof to counsel for all parties for the purpose of receiving their suggestions.

• • • • •

Appendix F

January 22, 1976 Order and Judgment in Default

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

73 Civ. 2422 (CBM)

#76,061

PAINE, WEBBER, JACKSON & CURTIS, INCORPORATED,

Plaintiff,

—against—

INMOBILIARIA MELIA DE PUERTO RICO, INC.,

Defendant.

ORDER AND JUDGMENT IN DEFAULT

This cause came to be heard on plaintiff's cross-motion dated June 13, 1975 for an order pursuant to Federal Rule of Civil Procedure 37 imposing sanctions upon the defendant and awarding plaintiff reasonable expenses, including attorneys' fees, incurred by reason of defendant's conduct; and

WHEREAS by order of this Court filed on March 5, 1974 defendant was ordered to produce on or before February 26, 1974 documents whose production was sought by plaintiff's request for production of documents dated September 25, 1973 and to appear on April 17, 1974 for its oral examination by Mr. Fullana; and

WHEREAS by order of this Court filed on September 11, 1974 plaintiff's previous motion, dated December 13, 1973, for an order compelling discovery or imposing sanctions was dismissed as moot based upon this Court's order filed March 5, 1974; and

WHEREAS by order of this Court filed on November 11, 1974, after counsel for both parties having been heard and pursuant to findings by this Court that the defendant had failed to comply with this Court's order of March 5, 1974, insofar as it directed the production of documents, and that no objection had been made to plaintiff's request for production, defendant was ordered to produce on or before December 15, 1974 those documents responsive to plaintiff's request for production of documents dated September 25, 1973, including those documents specifically requested during the deposition of defendant held on February 28 and March 5, 1974; and

WHEREAS said order of November 11, 1974 further included a recommendation that, failing said production, defendant's answer be stricken and judgment be entered for plaintiff; and

WHEREAS at a conference with Magistrate Schreiber held on December 18, 1974 he orally directed the defendant to supply affidavits indicating that plaintiff's request for documents has been complied with fully, if no further documents are produced; and

WHEREAS the defendant has failed to comply with the aforesaid orders of this Court insofar as they require the production of documents or affidavits in lieu thereof and

defendant's appearance for its oral examination by Mr. Fullana; and

WHEREAS defendant's failure to comply has been due to willfulness, rather than an inability to comply, and defendant has no justifiable reason for noncompliance; NOW IT IS HEREBY

ORDERED pursuant to Federal Rule of Civil Procedure 37(b)(2) that:

(1) this Court has jurisdiction of the parties and of the subject matter;

(2) the allegations of the complaint in this action are taken to be established for purposes of this action;

(3) the amended answer filed by the defendant in this action is stricken and the counterclaims against the plaintiff are dismissed with prejudice;

(4) the defendant is precluded from opposing the claims asserted in the complaint and from supporting the defenses and claims asserted in its amended answer and counterclaims;

(5) a judgment by default against defendant shall be entered by the Clerk of this Court in the amount of $285,000, plus interest at the rate of six percent per annum from the date plaintiff's cause of action arose, which was on or about November 1, 1972, plus reasonable expenses, including plaintiff's attorneys' fees, in the amount of $3,743.50 incurred by defendant's unjustified failure to comply with the orders of this Court; and

(6) plaintiff shall file with the Clerk of this Court a bill of costs which shall be taxed against defendant.

Dated: New York, New York
January 16, 1976

s/ Constance Baker Motley
United States District Judge

Judgment Entered 1-22-76

/s/ Raymond F. Burghardt
Clerk

U.S. District Court
Filed
Jan 22 1976
S.D. of N.Y.

Supreme Court, U. S.
FILED
FEB 7 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-952

INMOBILIARIA MELIA DE PUERTO RICO, INC.,
Petitioner,

against

PAINE, WEBBER, JACKSON & CURTIS, INCORPORATED,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JUDSON A. PARSONS, JR.
140 Broadway
New York, New York 10005
Attorney for Respondent

Of Counsel:

DEWEY, BALLANTINE, BUSHBY,
PALMER & WOOD

February 7, 1977

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IN THE

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No. 76-952

INMOBILIARIA MELIA DE PUERTO RICO, INC.,
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PAINE, WEBBER, JACKSON & CURTIS, INCORPORATED,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Opinion Below

The opinion of the United States Court of Appeals for the Second Circuit is reported at 543 F.2d 3 (2d Cir. 1976).

Statute and Rules Involved

The petition involves a consideration of Rules 37(b)(2) and 53(c) and (e) of the Federal Rules of Civil Procedure and 28 U.S.C.A. § 636(b). Rule 37(b)(2) appears in Appendix E of the petition. Rule 53(c) and (e) and 28 U.S.C.A. § 636(b) are reprinted in Appendix D of this brief.

Questions Presented

1. Did the court of appeals correctly hold that it was not an abuse of discretion for the district court to apply the sanctions provided in Rule 37 of the Federal Rules of Civil Procedure where, despite a number of outstanding district court orders to do so, petitioner

(a) had repeatedly and willfully failed to appear for a deposition; and

(b) had also willfully failed to produce documents requested by respondent or, in lieu thereof, affidavits attesting to the nonexistence of such documents?

2. Can the question of the district court's power to review the magistrate's recommendations properly be raised for the first time before this Court?

3. Did the district court retain full powers of review over the magistrate's recommendations?

Statement of the Case

A. Nature of the Case

This action arose out of a brokerage agreement between respondent and petitioner wherein petitioner appointed respondent its sole and exclusive agent to secure financing for the construction of a condominium hotel, termed an "Apartotel", in Puerto Rico. (JA 8-14)* The contract also provided for the payment to respondent of a brokerage fee of 1½ percent of the amount of any loan commitment delivered to and/or accepted by the petitioner. Through the services of an independent broker and while the exclusive agency contract with respondent was in full force and effect, petitioner obtained financing from a lender earlier contacted by respondent on petitioner's behalf. (JA 57; EV 93-97, 99, 167-69; Pet. 10)

As a result of respondent's breach of the contract, on May 31, 1973, respondent sued to recover the commission fee in the amount of $285,000. (JA 5-14) Petitioner does not deny that the financing was obtained through another broker, nor does it dispute the provisions of the contract itself. By its amended answer, however, dated April 8, 1975 and served nearly two years after this action commenced, petitioner asserted counterclaims seeking damages

* "JA" refers to the Joint Appendix and "EV" refers to the Exhibit Volume, both of which petitioner has requested be transmitted to this Court; "Pet." refers to the petition.

in the amount of $1,500,000 for a delay that allegedly occurred as a result of respondent's efforts in seeking financing for the petitioner. (JA 15-16) The lack of merit of petitioner's counterclaims is revealed by a review of the record, which establishes that any delay occurred largely as a result of petitioner's failure to provide adequate guarantees for a multimillion dollar loan and to supply adequate supporting data to First Mortgage Investors Trust, a potential lender contacted by respondent. (EV 40-43, 396-99, 411-13, 510-11, 531-34)

Moreover, under the law governing the contract, petitioner is liable for the brokerage fee as a result of the nature of the exclusive agency created, respondent's efforts in securing financing, petitioner's conduct impeding those efforts and its use of another broker while the contract with respondent was in effect. That respondent's claim is meritorious is further evidenced by petitioner's continued failure, for more than two years, to appear for its deposition and to provide relevant corporate records. In fact, by its default, petitioner has admitted every well-pleaded allegation in respondent's complaint and reply to the counterclaims.*

In any event, petitioner's reliance on the purported merits of its claim and its belated attack on that of respondent to excuse its contumacious behavior is totally misplaced. At this juncture, where both the district court and the court of appeals found petitioner's failure to comply with outstanding discovery orders willful and deserving of the severest of sanctions, any reference to the underlying claim is wholly collateral.** Petitioner had numerous opportunities to test the merits of its claim by complying with the court's discovery orders and expeditiously pro-

* *Hammond Packing Company* v. *Arkansas*, 212 U.S. 322, 351 (1909).

** *See Trans World Airlines, Inc.* v. *Hughes*, 449 F.2d 51, 63-64 (2d Cir. 1971), *rev'd on other grounds*, 409 U.S. 363 (1973).

ceeding to trial. It is now simply too late for petitioner to seek to avoid liability by challenging the validity of respondent's claim.

B. Proceedings in the District Court

1. *Respondent's First Motion for Sanctions and the District Court's Order of March 5, 1974.*

After the filing of petitioner's answer on July 30, 1973 (JA 15-16), respondent noticed the depositions of petitioner by Martin L. Cohen, Jack Berger and Pedro Fullana, the three principal figures in petitioner's operations,* for November 1, 1973 in New York, and also served notice pursuant to Fed. R. Civ. P. 34 that certain documents be produced by petitioner by October 25, 1973.** (JA 20-22, 24-25) None of the requested materials were forthcoming on that date.

* Cohen owns or controls approximately 50 percent of petitioner's stock and is a director and president of petitioner. (EV 9-10) Berger was a director and senior financial officer of the Melia Organization, which owns approximately three-eighths of the stock of petitioner. (JA 63; EV 204-05) Fullana controls one-eighth of the stock of petitioner, is its executive vice-president and is in charge of its operations in Puerto Rico. (JA 56, 63, 244; EV 215, 452)

** Plaintiff's Notice to Produce requested, *inter alia:*

> 2. All documents which reflect or refer or relate to any negotiation, discussion, agreement, understanding or communication, occurring from January 1, 1971 to date with Paine, Webber or any broker other than Paine, Webber in connection with any financing or proposed financing of the construction of the Apartotel.
>
> 3. All documents which reflect or refer or relate to any negotiation, discussion, agreement, understanding or communication, occurring from January 1, 1971 to date concerning any loan made or proposed to be made, by Housing Investment Corp., Inc. or The Chase Manhattan Bank, N.A. to you in connection with the construction of the Apartotel or the actual or proposed employment of any broker in connection with such loan.
>
> 4. Any other documents which reflect or refer or relate to any negotiation, discussion, agreement, understanding or communication occurring from January 1, 1971 to date between you and any other person, concerning the financing of the construction of the Apartotel. (JA 21-22)

On October 29, 1973, attorneys for the parties agreed that the documents would be produced "as soon as possible, hopefully prior to November 16" and that the depositions of Cohen and Berger would take place on December 4, 1973. In addition, the deposition of respondent by Leonard Wilkes, head of respondent's national mortgage department, was rescheduled for November 21, 1973. (JA 39)

Wilkes' deposition, the only discovery petitioner has ever sought in this action, proceeded as scheduled on November 21, 1973. (EV 354 *et seq*) At that time, noting that all that had been thus far produced were basically the "attorneys' files," which did not include the bulk of the documents requested, respondent's attorney again requested from Richard F. Horowitz, Esq., petitioner's attorney, the production of petitioner's documents. (EV 356-57) Mr. Horowitz conceded that "there is no question that I have not produced all the documents that you have requested." (EV 357)

Despite this concession, no further documents had been produced by December 3, 1973 and, in response to telephone requests, Mr. Horowitz informed respondent's attorneys that he was still unable to comply with the production request. In addition, he stated that neither Cohen nor Berger would appear, as previously scheduled, for their depositions the next day and that the depositions could not be held until the end of January 1974 at the earliest. (JA 31-32, 41)

On December 18, 1973, respondent served its first motion for an order for sanctions pursuant to Fed. R. Civ. P. 37. (JA 28-39) Petitioner filed an affidavit in response in which Mr. Horowitz conceded that petitioner was under an obligation to produce its officers, directors and managing agents for depositions and that the "propriety" of respondent's notice for production of documents had never been ques-

tioned. Petitioner further indicated that it had no objection to the court fixing dates for the depositions "at the very end of January or at any time thereafter" and committed itself to producing the remainder of the requested documents "in late January or early February." (JA 40-42)

The motion was assigned to Magistrate Schreiber for a hearing and report and, on February 22, 1974, at his suggestion and subject to the district court's approval, the parties entered into a stipulation which included a discovery schedule for depositions and document production. The stipulation provided that all future pre-trial discovery proceedings would be referred to Magistrate Schreiber for supervision; that the documents sought by the respondent's pending request for document production would be produced on or before February 26, 1974; that the Cohen and Berger depositions would be held on February 28, 1974 and March 5, 1974, respectively; and that the Fullana deposition would be deferred *sine die*. The district court modified the stipulation to schedule the Fullana deposition on April 17, 1974. As modified, the discovery schedule became the district court's order, dated February 26, 1974 and filed on March 5, 1974. (JA 44-45)*

Contrary to petitioner's suggestion (Pet. 13), by entering into the stipulation the parties had not "extended" the scope of the district court's referral to the magistrate beyond the mere supervision of discovery proceedings. Nor was there a reference under Fed. R. Civ. P. 53 or even a hint that the parties considered the magistrate's role in the proceeding to be that of a master acting under Rule 53, as the petitioner now contends for the first time before this Court.

---

* Petitioner has included in the Joint Appendix only the stipulation as presented to, but not as modified by, the district court. (JA 44-45) The district court's order including the modification is part of the record in this case (JA 2) and a copy is included in Appendix A of this brief.

That the district court retained full review powers under the stipulation is confirmed by the court's modification of the stipulation with respect to the scheduling of the Fullana deposition for April 17, 1974. Moreover, petitioner's assertion, now made for the first time, that the modification was a "calendar control device" (Pet. 14) is without an iota of support in the record. To the contrary, the court's supervision over discovery was express notice to the petitioner that the action was one in which discovery was to proceed expeditiously and that the case was one in which the district court was taking an active interest.

2. *Importance of the Fullana Deposition and the Requested Documents.*

The Cohen and Berger depositions were held as scheduled but, as of February 26, 1974, only a few additional documents were produced by the petitioner. Although the petitioner was engaged in the construction of a multimillion dollar Apartotel and had its principals located in New York, Puerto Rico and Spain, it produced *no* correspondence among the principals concerning any aspect of the financing of the Apartotel project, *no* agreement with the broker who eventually arranged the financing (although he received $170,000 for his efforts), *no* minutes of its board of directors meetings at which the project was discussed, and none of the other relevant documentation one would expect of such a major transaction.

During the course of the Cohen and Berger depositions, it became apparent that petitioner had made little effort whatsoever to comply with either respondent's document requests or the district court's March 5, 1974 order and that the additional documents called for by respondent's notice did indeed exist and had not yet been produced. Notably, Cohen testified that Fullana's files had not been searched,

and Berger stated that his own files had never been examined. (EV 12, 258-59). Thus, the district court's finding of petitioner's willful failure to produce such documents was amply supported by the record even as early as March 1974.

At the Berger and Cohen depositions, petitioner was again specifically requested to make the necessary searches and to produce the requested documents. (EV 12-14, 81-82, 97, 206) In addition—and contrary to petitioner's assertion (Pet. 14, 24)—at those depositions, the vital importance of Fullana to the petitioner's operations and, consequently, of his deposition to the respondent became readily apparent. Cohen and Berger's denials of knowledge in certain key areas belie petitioner's assertion that the Fullana deposition would have been repetitious and unnecessary.* Furthermore, Cohen's and Berger's testimony corroborated the testimony of respondent's mortgage broker concerning Fullana's crucial importance to the financing of the Apartotel and his primary role in all

* Cohen's deposition testimony revealed that Fullana had initiated the discussions concerning construction of the Apartotel (EV 6-7); that Fullana had custody of the minutes of the board of directors meetings (EV 12); that it was Fullana's and Berger's decision to initially approach respondent (EV 22); that Fullana "instituted most of the attempts at getting financing", contacted HIC (the ultimate source of petitioner's financing), and conducted the negotiations with HIC and the independent broker (EV 16, 22, 89, 101); that the "ultimate financing was the result of Mr. Fullana's efforts" (EV 16-17); that Cohen did not know whether Fullana had ever entered into a written agreement with a broker other than respondent (EV 19-20); and that Fullana executed the agreement with HIC on behalf of petitioner and was a guarantor of the loan. (EV 12, 146-48).

Berger testified that Fullana was "masterminding" the petitioner's operations in Puerto Rico and that he (Berger) had no independent knowledge of the Apartotel (EV 215); that Melia (the Spanish corporate shareholder of petitioner and Berger's employer) was "putting [its] ball into Mr. Cohen's and Mr. Fullana's hands . . ." (EV 248); and that Fullana executed a supplemental financing agreement with HIC on behalf of petitioner. (EV 315-19)

aspects of the financing arrangements. (EV 362-63, 383, 411-12)

3. *Petitioner's Belated Motion to Change the Location of the Fullana Deposition.*

By April 8, 1974, none of the requested documents had been produced and, in a letter of that same date, respondent's attorneys reminded Mr. Horowitz of his client's failure to produce and of the Fullana deposition scheduled by court order for April 17, 1974. (JA 168) On April 12, 1974, more than six months after the deposition had been noticed for New York, more than one month after the district court's order and just five days before the deposition was to have occurred, petitioner served motion papers seeking an order directing that the Fullana deposition be held in Puerto Rico rather than in New York. Petitioner also sought an order allowing it to amend its answer to assert counterclaims and transferring the action to the District of Puerto Rico. (JA 46-58)

The timing of the motion suggests that it was merely a device to further delay the deposition. Significantly, the motion again confirmed the importance of Fullana's deposition. In a sworn affidavit submitted in support of the motion, Cohen stated that "Mr. Fullana will be a significant witness because, at least at the outset, he had most of the dealings with [respondent] and also because of his familiarity with the construction site involved in this litigation." (JA 56) It is undisputed that, notwithstanding the court's order of March 5, 1974, Fullana failed to appear for his deposition on April 17th.

4. *The Orders of November 11 and December 18, 1974.*

By letter dated June 26, 1974, respondent again requested completion of the document production, which remained

unaffected by petitioner's pending motions. (JA 169) The request was renewed in a telephone conversation with petitioner's attorney on August 16, 1974. (JA 148) In response, on October 21, 1974, petitioner's counsel wrote that neither his firm nor Berger had any further documents to produce. (JA 170) No mention was made about whether Cohen or Fullana or any other officers or employees of petitioner had any documents. Thus, petitioner's assertion that "it was ultimately made clear that there were no such documents" (Pet. 5n) is simply false.

As a result of petitioner's latest refusal to produce documents, respondent requested a conference with Magistrate Schreiber which was held on November 6, 1974. Magistrate Schreiber refused to believe that the requested documents did not exist, and the conference resulted in a second discovery order, filed on November 11, 1974, which required that the documents requested in respondent's Rule 34 notice and those specifically requested during the Cohen and Berger depositions be produced "on or before December 15, 1974", failing which it was recommended that "[petitioner's] answer be stricken and judgment be entered for [respondent]". (JA 171-72) The November 11th order, which gave petitioner express notice of the risk of a default judgment for continued failure to produce the documents, expressly refutes petitioner's contention that the default judgment subsequently entered was unexpected. Moreover, implicit in the order was a finding that petitioner had willfully failed to produce documents which should have been readily available and were clearly relevant to the litigation.

On December 16, 1974, petitioner produced three envelopes filled entirely with Cohen's personal and business travel and telephone bills and receipts, predominantly addressed to a Cohen family corporation unrelated to petitioner, as well as some other correspondence with travel

companies concerning disputed bills. (JA 149) Except for these records, petitioner has produced fewer than thirty documents, the great majority of which was correspondence between respondent and petitioner. And still, no documents from Fullana have been produced other than a few produced from Puerto Rico during the Berger deposition. (See EV 301)

At respondent's request, yet another conference was held with Magistrate Schreiber on December 18, 1974. The result was a third discovery order directing petitioner's counsel to supply affidavits by the petitioner's principals indicating respondent's document requests had been complied with fully. (JA 150, 192) To this date, these affidavits have never been produced nor have additional documents been forthcoming.

5. *Respondent's Second Motion for Sanctions.*

On March 31, 1975, the district court denied petitioner's motion to transfer the Fullana deposition to Puerto Rico, leaving in full effect its March 5, 1974 order requiring Fullana's appearance at his deposition. Thereafter, the parties agreed that the deposition would be held on April 23, 1975, but, on April 22, 1975, Mr. Horowitz informed respondent's attorneys that Fullana would not appear. (JA 150) After further attempts to fix a date, Mr. Horowitz indicated that he had been unable to contact Fullana and the deposition has never been held. (JA 150-51)

It soon became clear that the petitioner's failure to obey court orders was not the fault of its counsel, but, rather, was entirely of its own doing. On June 3, 1975, petitioner's counsel moved for leave to withdraw as counsel of record conceding that "[s]ignificant additional discovery is required before the matter will be ready for trial" and that "[w]e have been unable to obtain the necessary coopera-

tion from the client that is required for us to do a professional and competent job of representing the [petitioner] in this case." (JA 137-41) Respondent opposed the motion on the ground that the relief sought would create further delay and cross-moved for a default judgment on the ground that petitioner had continually failed to appear for its deposition and produce documents or affidavits in lieu thereof. (JA 142-72)

On September 3, 1975, the motion was referred by the district court to Magistrate Schreiber for a hearing and report. By letter dated October 3, 1975, the district court informed the parties that all pre-trial procedures were to be completed by December 1, 1975, with a trial date to be scheduled for some time after April 1, 1976, and that the court would decide any substantive motions. (JA 179-81) This was yet another indication that the court would countenance no further delays, intended to remain directly involved and, consequently, would be the final arbiter of all pre-trial disputes, including the pending motions.

Seeking to afford petitioner yet another opportunity to comply with the court's orders, at a conference on December 1, 1975, Magistrate Schreiber said he favored a "last chance" discovery schedule and directed counsel for respondent to prepare a proposed discovery order which he would forward to the court as his recommended order. (JA 191-93) The magistrate's recommendation was submitted for the district court's consideration along with both parties' motion papers.* At no time did respondent suggest that it no longer sought a default judgment.

* The motion papers included, *inter alia*, a detailed affidavit outlining the entire procedural history of the case as well as respondent's earlier motion for sanctions, dated December 17, 1973. (JA 144-52, 153-58) Other exhibits before the court included the original notice of deposition (JA 159-60); the original Rule 34 notice, dated Sep-

(footnote continued on p. 13)

Petitioner's claim that the magistrate's recommended order "contained an implicit finding as to [petitioner's] good faith" (Pet. 3, 12) is entirely baseless. As is clear from the order itself, the magistrate found that petitioner "has failed to comply with this Court's orders insofar as they direct the production of documents or affidavits in lieu thereof and the appearance of [petitioner] for its oral examination by Mr. Fullana." (JA 192) Nothing in that recommended order even remotely suggests that the magistrate found that petitioner had been proceeding with discovery in good faith. Furthermore, petitioner's continued failure to produce documents or affidavits and to appear for its deposition by Fullana, even after the district court's order of October 3, 1975 which required completion of pre-trial discovery by December 1, 1975, points out the inaccuracy of petitioner's assertions that it had been engaged in "good faith" efforts to comply with its discovery obligations.

6. *The Default Judgment.*

On January 12, 1976, the district court rejected Magistrate Schreiber's proposed order, granted respondent's cross-motion and ordered the entry of a default judgment. (JA 173; Pet. B-1) In view of the court's continued active interest in the case, its prior refusal, where necessary, to

(footnote continued from p. 12)

tember 25, 1973 (JA 161-63); a letter from petitioner's attorney agreeing to the Cohen and Berger depositions on December 4, 1973 and promising the requested documents "hopefully prior to November 16" (JA 164); petitioner's affidavit in opposition to respondent's first motion for sanctions (JA 165-67); respondent's letters, dated April 8, 1974 and June 26, 1974, requesting documents (JA 168, 169); petitioner's letter of October 21, 1974 confirming that petitioner's attorney had "no further documents to produce" (JA 170); and Magistrate Schreiber's order, dated November 8, 1974, recommending the imposition of sanctions should the petitioner fail to meet the ordered discovery schedule. (JA 171-72)

accept without modification the recommendation of the magistrate, its order of October 3, 1975, and the magistrate's recommendation concerning default in his November 11, 1974 order, petitioner's contention that the court's action was without warning or notice and was to everyone's surprise (Pet. 18) is unfounded. Furthermore, although the court rejected the magistrate's proposed "last chance" opportunity for petitioner, it did not reject the magistrate's findings. Indeed, the court premised its order upon those findings and determined that nearly two years of willful noncompliance with court orders mandated entry of a default judgment.

Petitioner filed a motion to vacate the district court's order and for entry of the order proposed by Magistrate Schreiber. (JA 194-211) On January 21, 1976, a hearing was held before the district court at which the court denied petitioner's motion. Petitioner's claim that the district court was unfamiliar with the facts of the case and failed to consider the entire record is belied by the transcript of that hearing. The hearing minutes are replete with indications that the court was familiar with and had considered the entire record in making its determination. (JA 228, 231, 232-33, 235) Moreover, as was true when the court first considered the magistrate's proposed order, the court had before it petitioner's counsel's motion for leave to withdraw and respondent's cross-motion for sanctions, including all the exhibits to respondent's cross-motion. (See p. 12n *supra*)

Although petitioner had ample opportunity at the hearing to expand or clarify the record, when directly asked by the court to account for Fullana's failure to appear for his deposition, petitioner not only failed to offer any excuses, but also explicitly denied that any such excuses would be

forthcoming.* (JA 228-31; Pet. C-12-15) Furthermore, the excuse now offered by the petitioner to explain its failure to produce affidavits in lieu of documents, *viz.*, the court's default ruling of January 12, 1976 "deflected" petitioner's attorney from producing the affidavits of compliance "which they would otherwise have filed" (Pet. 18), ignores the fact that such production was ordered on December 18, 1974, more than one year before the court's entry of the judgment.**

---

* The following are characteristic exchanges:

> "The Court: Let me ask you this: What accounts for your client's failure to appear previously for his deposition, prior to the Magistrate's proposed order—that is, as to Mr. Fullana? What accounts for his failure to appear for more than a year? I gather he was notified sometime in December or September—
>
> Mr. Horowitz: I made a motion to withdraw as counsel in this case, and the reason I made that motion was that I had not been getting cooperation from my client, especially from Mr. Fullana. I don't think, in view of the confidence of attorney-client, that I should comment any further than I have in the motion papers." (JA 228; Pet. C-12-13)
>
> * * *
>
> "Mr. Horowitz: Your Honor, I am not here to attempt to justify Mr. Fullana's failure to appear between March of 1975 and the date of the conference before the Magistrate.
>
> The Court: We are here because I am concerned with it. If you don't want to justify it, you don't have to, but that is why we are here, to determine whether a default judgment ought to be entered against your client, and, as far as I can see, the record is clear that your client wilfully failed to appear for his deposition, and that is why a default judgment is going to be entered against him, notwithstanding the recommendation of the Magistrate, because I disagree with it, that he is entitled to a second chance." (JA 231; Pet. C-14-15)

** Although petitioner's attorney refers both in the hearing transcript and in the petition to January 15, 1976 (JA 223; Pet. 19n, C-9), the date on which the affidavits would have *again* been required pursuant to Magistrate Schreiber's recommended order of December 9, 1975, in fact, petitioner was in default since December 18, 1974 in supplying those affidavits. Thus, petitioner is simply wrong when he states that the affidavits were not due until January 15, 1976. (Pet. 19n)

On January 22, 1976, the court's order and default judgment were filed. (JA 238-40) The court also awarded respondent reasonable expenses, including attorney's fees, in the amount of $3,743.50. (JA 240) Petitioner appealed to the United States Court of Appeals for the Second Circuit and, on October 12, 1976, the court of appeals unanimously affirmed the judgment, holding:

> "The record here, as indicated in the statement of facts, fully supports the finding that Fullana had willfully failed to appear for his deposition for more than seven months. Moreover, the corporate records sought here appear to be pertinent to the litigation and would normally be expected to be readily obtainable. The failure ever to produce them or by affidavit to account for their nonproduction again compels the conclusion that the District Judge did not abuse her discretion in applying the sanctions described." 543 F.2d at 6; (Pet. A-6).

ARGUMENT

I

The Court Below Correctly Applied This Court's Opinion in *National Hockey League* and, Therefore, No Adequate Reason Is Presented for Granting the Petition.

Rule 37(b)(2) of the Federal Rules of Civil Procedure provides in pertinent part:

> "If a party or an officer, director, or managing agent of a party . . . fails to obey an order to provide or permit discovery . . . the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
>
> • • •

> (C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party."

In *National Hockey League* v. *Metropolitan Hockey Club*, 96 S. Ct. 2778 (1976), this Court has recently reaffirmed the standard of review of questions involving Rule 37 sanctions:

> "The question, of course, is not whether this Court, or whether the Court of Appeals, would as an original matter have dismissed the action; it is whether the District Court abused its discretion in so doing." 96 S. Ct. at 2780.

The court below, citing its prior decisions in *Flaks* v. *Koegel*, 504 F.2d 702 (2d Cir. 1974) and *Trans World Airlines, Inc.* v. *Hughes*, 332 F.2d 602 (2d Cir. 1964), *rev'd on other grounds*, 409 U.S. 363 (1973), applied precisely this standard. After full consideration of the record, the court of appeals held that the record clearly demonstrated that petitioner had willfully failed to appear for its deposition by Fullana, its executive vice-president, and had failed to produce pertinent documents or affidavits in lieu thereof. Accordingly, the court of appeals held that the district court acted within its discretion in entering a default judgment against petitioner. As a further basis for its affirmance of the district court's action, the court of appeals quoted this Court's opinion in *National Hockey League*:

> "[T]he most severe in the spectrum of sanctions provided by statute or rule must be available to the District Court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent." 543 F.2d at 6; (Pet. A-6).

The determination in the courts below was almost entirely factual and the petitioner is merely seeking another factual review by this Court. After a detailed review of the record, however, the court of appeals found ample support for the district court's finding of a willful failure by petitioner to comply with outstanding discovery orders, and that decision should not be disturbed. There is no point in any further review of the decision below, which was merely a routine application of this Court's recent decision in the *National Hockey League* case.

II

The Recommended Order of the Magistrate Did Not Come Within the Purview of Fed. R. Civ. P. 53 and Is Not a Proper Issue For This Court to Consider.

Point II of the petition purports to raise a question concerning the standard of review to be used by a district court in reviewing a magistrate's findings which come within the purview of Rule 53 of the Federal Rules of Civil Procedure. This question is not proper for review by this Court in this case because it was not presented to or decided by the court of appeals. As shown by the "Index" and "Issues Presented" sections of petitioner's brief submitted to the court of appeals (which are reprinted in Appendices B and C of this brief), petitioner never raised any Rule 53 issues below. Nor is any reference to Rule 53 found in petitioner's affidavit in support of its motion to vacate the default judgment which was submitted to the district court. (See JA 194-211)

This Court has stated that it "sits as a Court of review. It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are

reviewed." *Duignan* v. *United States,* 274 U.S. 195, 200 (1927). The petitioner cites no exceptional circumstances in this case which warrant this Court's deviation from that principle of review.

Aside from the question of the propriety of review of petitioner's Point II, the record confirms that there never was a reference in this case which came within the purview of Rule 53. This rule provides for reference to a master who is, *inter alia,* to report on particular issues or perform particular acts as detailed in an order of reference. Fed. R. Civ. P. 53(c). If the order requires the master to make findings of fact and conclusions of law, he is to set them forth in his report. Fed. R. Civ. P. 53(e)(1). Section (b)(1) of 28 U.S.C.A. § 636 (Supp. 1976), the jurisdictional statute for magistrates, authorizes a district court to appoint a magistrate to act in the capacity of "a special master . . . pursuant to the . . . Federal Rules of Civl Procedure." However, it is clear in this case that the magistrate acted pursuant to 28 U.S.C.A. § 636(b)(2), which authorizes a magistrate to assist "a district judge in the conduct of pretrial or discovery proceedings" in civil actions and which is entirely distinct from a reference to a master.

In this case, the magistrate was only to supervise pretrial discovery and was not specifically required to make findings of fact or conclusions of law in his report. In addition, the parties as well as the magistrate were aware that the district court would treat the magistrate's report only as a recommendation, as evidenced by the court's action in scheduling the Fullana deposition for April 17, 1974 and the court's October 3, 1975 letter informing the parties that the court would decide all substantive motions, which, of course, included respondent's motion. (JA 179-81)

Petitioner's only basis for contending that there was a Rule 53 reference is the parties' stipulation, dated February 22, 1974, which stated that "all future pre-trial discovery proceedings shall be referred to Magistrate Sol Schreiber for supervision." (JA 44; Pet. 25) Relying upon *DeCosta* v. *Columbia Broadcasting System, Inc.*, 520 F.2d 499 (1st Cir. 1975), *cert. denied*, 423 U.S. 1073 (1976), petitioner claims that as a result of the stipulation, the magistrate's findings were subject to reversal only if clearly erroneous. In *DeCosta*, however, the entire case was referred to a magistrate "for hearing and determination." 520 F.2d at 502. The distinction between that reference and one of discovery proceedings for supervision makes petitioner's reliance on *DeCosta* untenable.

Moreover, petitioner's position before this Court is directly contrary to that which it took at the January 21, 1976 hearing before the district court. At the hearing, the following discourse occurred:

> "The Court: Are you suggesting the Court is bound by the report of the Magistrate?
>
> Mr. Horowitz: I would not presume to suggest that, your Honor. I appreciate that the Court has discretion to accept or to reject or to modify the recommendations of the Magistrate and I am in the process of suggesting to the Court reasons why I think that the Court would want to accept the recommendation of the Magistrate." (JA 219-20; Pet. C-7)

Thus, consistent with the stipulation, the parties have always recognized that the district judge remained free to accept, reject or modify the magistrate's reports, and petitioner has presented no evidence which suggests otherwise. Petitioner's Point II is without any legal or factual merit and is totally inappropriate for review by this Court in this case.

Conclusion

No questions raised in the petition make Supreme Court review appropriate, and the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Paine, Webber, Jackson
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Of Counsel:

DEWEY, BALLANTINE, BUSHBY,
PALMER & WOOD

February 7, 1977

APPENDICES

APPENDIX A
The District Court's Order of March 5, 1974

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Conformed Copy
U. S. District Court
Filed
MAR. 5 1974
S. D. of N. Y.

PAINE, WEBBER, JACKSON & CURTIS INCORPORATED,

Plaintiff,

-against-

INMOBILIARIA MELIA DE PUERTO RICO, INC.,

Defendant.

73 Civ. 2422 (CBM)

STIPULATION

It is hereby stipulated and agreed by and between the undersigned counsel for the parties to this action that:

1. All future pre-trial discovery proceedings shall be referred to Magistrate Sol Schreiber for supervision.

2. The pending motion of plaintiff to compel discovery or impose sanctions is resolved as follows:

a. The documents whose production was sought by plaintiff's pending request for production of documents shall be produced on or before February 26, 1974 at a place to be agreed upon by counsel;

b. The oral examinations pursuant to Federal Rule of Civil Procedure 30 of Messrs. Cohen and Berger will be taken at the offices of counsel for plaintiff on February 28, 1974 at 10:00 a.m., and on March 5, 1974 at 9:30 a.m., respectively; and

c. The oral examination pursuant to Federal Rule of Civil Procedure 30 of Mr. Fullana is deferred CBM ~~direction~~ until April 17, 1974

Dated: New York, New York
February 22, 1974

DEWEY, BALLANTINE, BUSHBY, PALMER & WOOD

By _____
A Member of the Firm

Attorneys for Plaintiff
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WEISS, ROSENTHAL, HELLER & SCHWARTZMAN

By Richard Horowitz
A Member of the Firm

Attorneys for Defendant
295 Madison Avenue
New York, New York 10017
Tel. No. (212) 725-9200

SO ORDERED: February 26, 1974

/s/ Constance Baker Motley
U.S.D.J.

MG

APPENDIX B

"Index" from Petitioner's Brief to the United States Court of Appeals for the Second Circuit

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TABLE OF AUTHORITIES

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APPENDIX C

"Issues Presented" in Petitioner's Brief to the United States Court of Appeals for the Second Circuit

Was it error and/or an abuse of discretion for the District Court, because of alleged non-compliance with certain discovery demands, to have directed entry of the default judgment against defendant on January 12, 1976 and to have dismissed defendant's counterclaims pursuant to plaintiff's Cross Motion of June 20, 1975:

> 1. Where testimony and documents adduced in already extensive pre-trial proceedings suggest both that plaintiff was not, in fact, the procuring cause of the loan ultimately obtained and could not, therefore, have prevailed on the merits in its claim for a mortgage placement brokerage fee, and that defendant's counterclaims, based upon serious factual misrepresentations by plaintiffs, are valid and substantial;
>
> 2. Where a stipulation of the parties referring "all future pre-trial discovery proceedings" to Magistrate Sol Schreiber "for supervision" had enabled plaintiff to press forward with discovery demands which would otherwise have been held in limbo for the period of a year during which the District Court kept *sub judice* a motion by defendant to transfer the action to the District of Puerto Rico;
>
> 3. Where the same stipulation which permitted plaintiff to press its discovery demands while defendant's transfer motion was *sub judice,* also mandated a denial or withdrawal of plaintiff's Cross Motion as moot or as having been waived, since further proceedings were had pursuant to such stipulation and a discovery schedule established thereunder by Magistrate Schreiber;

4. Where the aforesaid discovery schedule had been incorporated into an order agreed to and prepared by plaintiff and adopted, with minor revision, by Magistrate Schreiber, and defendant was in process of complying therewith, the remaining deposition witness, Pedro Fullana, having flown to New York City from Puerto Rico, in order to do so;

5. Where defendant's then attorney, had proferred [sic], and but for the timing of the default decision, would have provided an affidavit stating that none of the remaining documents sought by plaintiff existed or could be located, so that the proposed production of Pedro Fullana for a deposition in New York would have represented full compliance with the final discovery schedule agreed upon by the parties and embodied in the order of Magistrate Schreiber;

6. Where the District Court's order rejecting Magistrate Schreiber's discovery order and schedule and granting plaintiff's six months old Cross Motion was issued without prior notice or warning to defendant and ignored the waiver and abandonment of such Cross Motion implicit in plaintiff's subsequent agreement before Magistrate Schreiber to a discovery schedule;

7. Where plaintiff's discovery was already extensive and complete enough to suggest that the deposition of Pedro Fullana, for lack of which the default issued, was not essential to the prosecution of plaintiff's case; and

8. Where defendant had moved to have the final deposition conducted in Puerto Rico, where Mr. Fullana resided, and such motion should properly have been granted under the circumstances.

APPENDIX D

Federal Rule of Civil Procedure 53

MASTERS

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(c) Powers. The order of reference to the master may specify or limit his powers and may direct him to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the master's report. Subject to the specifications and limitations stated in the order, the master has and shall exercise the power to regulate all proceedings in every hearing before him and to do all acts and take all measures necessary or proper for the efficient performance of his duties under the order. He may require the production before him of evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents, and writings applicable thereto. He may rule upon the admissibility of evidence unless otherwise directed by the order of reference and has the authority to put witnesses on oath and may himself examine them and may call the parties to the action and examine them upon oath. When a party so requests, the master shall make a record of the evidence offered and excluded in the same manner and subject to the same limitations as provided in Rule 43(c) for a court sitting without a jury.

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(e) Report.

(1) *Contents and Filing.* The master shall prepare a report upon the matters submitted to him by the order of reference and, if required to make findings of fact and

conclusions of law, he shall set them forth in the report. He shall file the report with the clerk of the court and in an action to be tried without a jury, unless otherwise directed by the order of reference, shall file with it a transcript of the proceedings and of the evidence and the original exhibits. The clerk shall forthwith mail to all parties notice of the filing.

(2) *In Non-Jury Actions.* In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. Within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6(d). The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

(3) *In Jury Actions.* In an action to be tried by a jury the master shall not be directed to report the evidence. His findings upon the issues submitted to him are admissable as evidence of the matters found and may be read to the jury, subject to the ruling of the court upon any objections in point of law which may be made to the report.

(4) *Stipulation as to Findings.* The effect of a master's report is the same whether or not the parties have consented to the reference; but, when the parties stipulate that a master's findings of fact shall be final, only questions of law arising upon the report shall thereafter be considered.

(5) *Draft Report.* Before filing his report a master may submit a draft thereof to counsel for all parties for the purpose of receiving their suggestions.

Section 636 of Title 28 of the United States Code Annotated

§ 636. Jurisdiction, powers, and temporary assignment

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(b) Any district court of the United States, by the concurrence of a majority of all the judges of such district court, may establish rules pursuant to which any full-time United States magistrate, or, where there is no full-time magistrate reasonably available, any part-time magistrate specially designated by the court, may be assigned within the territorial jurisdiction of such court such additional duties as are not inconsistent with the Constitution and laws of the United States. The additional duties authorized by rule may include, but are not restricted to—

(1) service as a special master in an appropriate civil action, pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts;

(2) assistance to a district judge in the conduct of pretrial or discovery proceedings in civil or criminal actions; and

(3) preliminary review of applications for post-trial relief made by individuals convicted of criminal offenses, and submission of a report and recommendations to facilitate the decision of the district judge having jurisdiction over the case as to whether there should be a hearing.

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